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In the Supreme Court
OF THE
United States

OCTOBER TERM 1952

No. 652

WATERMAN STEAMSHIP CORPORATION, a corporation,
Petitioner,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

CLARENCE G. MORSE,
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FRANCIS L. TETREAULT,
310 Sansome Street, San Francisco 4, California,
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WATERMAN STEAMSHIP CORPORATION, a corporation,
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vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Waterman Steamship Corporation, hereinafter referred to as "petitioner" or "Waterman", respectfully presents to this Honorable Court its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a final decision made and entered by that Court on October 30, 1952 (R. 433), a rehearing thereof having been denied on December 22, 1952 (R. 479), Pope, Circuit Judge, dissenting (R. 480).

The judgment of the Court of Appeals is reported in 199 F. 2d 600. The opinion on denial of rehearing is not yet reported.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Respondent Shipowners contracted to provide the Tug SEA FOX and to use its best efforts to tow the SS HERALD OF THE MORNING, a "dead" ship,[1] from San Francisco Bay to Everett, Washington. The SEA FOX and HERALD departed from San Francisco Bay on November 5, 1948, and on the second day, in moderate weather, the towing wire broke, and the SEA FOX being unable to put its spare towing wire aboard, another tug was sent out from

[1] A "dead" ship is one whose power plant is shut down.

San Francisco Bay which towed the HERALD to nearby Drake's Bay. In attempting to handle her spare towing wire, the SEA FOX broke the fitting of her towing engine which is used in reeling in the towing wire and also jettisoned her spare full length towing wire. At Drake's Bay on November 8, 1948 the towing wire was transferred to the SEA FOX from the other tug, but the defect in the SEA FOX'S towing engine was not repaired and the SEA FOX was not furnished with a spare full length towing wire. THE SEA FOX and HERALD departed Drake's Bay and several days later, after the SEA FOX received storm warnings on November 12 and 13, ran into a severe storm on November 15. The HERALD again broke adrift on November 16, and salvage services were rendered to the HERALD by various government and private vessels.

A more detailed statement of the facts is set forth in Appendix "A" attached hereto. For convenience of the Court, we set forth the Beaufort Scale in Appendix "B" and in Appendix "C" the scripts of the weather broadcasts to mariners during the period in question.

The master of the tug SEA FOX, R. T. Sommer, held no license enabling him to serve as master of the tug SEA FOX on the high seas and lacked the high seas experience that would be necessary to secure such a license. In so serving as master and in himself standing a watch, Mr. Sommer (and respondents) acted in violation of the International Conven-

tion concerning the Minimum Requirement of Professional Capacity for Masters and Officers, 54 Stat. at L. Pt. 2, p. 1683 (effective in the United States October 29, 1939); administrative and penalty provisions, 46 U.S.C. Sec. 224a, et seq. (see Appendices "D" and "E").

A libel *in personam* to recover salvage services rendered to the HERALD after she broke adrift the second time was filed by Shipowners on behalf of the tug SEA FOX and its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug & Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs. The trial Court found no negligence on the part of respondents, held that the HERALD broke adrift "solely by reason of the violence of the storm", and held that the lack of a license on the part of Mr. Sommer "did not and could not have contributed to the plight of the HERALD" (R. 55-69). The award to the owner and crews of the tugs HERCULES and NEPTUNE totaling $22,250 was paid promptly and in full. Being gravely aggrieved by the judgment granting $24,750 to Shipowners as salvage in addition to $5,750 paid under the towage contract and denying Waterman recovery for its heavy expense and damage in favor of Shipowners, Waterman appealed to the Court of Appeals for the Ninth Circuit and has now taken this petition to this Honorable Court.

JURISDICTION.

A libel *in personam* in admiralty alleging the essential of the foregoing facts was timely filed by respondents against Waterman in the District Court of the United States for the Northern District of California, Southern Division, seeking to obtain an award for salvage services. Waterman appeared therein generally.

Jurisdiction of that admiralty matter existed in the District Court of the United States under the provisions of 28 U.S.C.A. Sec. 1333 (1). A final decree was made and filed in the trial Court on June 20, 1951, and entered June 21, 1951 (R. 70). A petition for appeal and order allowing appeal were filed September 17, 1951 and a notice of appeal to the Court of Appeals for the Ninth Circuit was filed September 17, 1951 (R. 73, 75).

Appellate jurisdiction of the Court of Appeals for the Ninth Circuit existed under 28 U.S.C. Sections 1291 and 2107.

The jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C. Section 1254 (1). The final decision of the Court of Appeals for the Ninth Circuit was made and entered on October 30, 1952 (R. 437), and the order denying a rehearing was made and entered on December 22, 1952 (R. 479).

This petition will be filed within the ninety (90) day period allowed by 28 U.S.C. Section 2101. A stay of the mandate of the Court of Appeals has been obtained.

QUESTIONS PRESENTED.

The questions presented in this petition are:

1. May a tug owner recover salvage from the owner of a dead tow (without proving that its failure to provide the tug with a licensed master and licensed watch officer as required by statute could not have contributed to the exposure of the tow to the peril which required the rendition of "salvage" services) where on the clear and undisputed evidence produced by the tug owner it appears that:

a. The tug had undertaken and performed a high seas towing operation with a "master" who held no license and lacked the high seas experience necessary to secure a license (in violation of 46 U.S.C.A. 224(a)), and

b. The tug had performed a high seas towing operation with one watch (8 hours per day) commanded by an "officer" who held no high seas license and lacked the high seas experience necessary to secure a license (in violation of 46 U.S.C.A. 224(a)), and

c. The tug under the direction of the unlicensed "master" had left a place of safety with her tow without repairing the broken "fairlead traveler" of her towing engine—a device provided to enable the tow to reel in the towing cable and

d. The tug under the direction of the unlicensed "master" had left a place of safety with no spare towing cable of adequate length (one

towing cable having previously parted in moderate weather) and

e. The tug under direction of the unlicensed "master" had for 36 hours effectively ignored the radio warnings it had received of the approach of the storm which ultimately placed the tow in the peril requiring the "salvage" services, and

f. The tug owner had contracted to "use its best efforts" to tow the dead ship safely to destination?

2. If the answer to question 1 is negative, i.e., that a tug owner may not collect "salvage" from its tow without proving that its own statutory fault not only did not but could not have contributed to the peril giving rise to the salvage, then does the tug owner carry the burden of proof placed on it where the record shows by the undisputed testimony of the tug owner's own witnesses that

a. The "master" of the tug lacked the four years' high seas experience and other high seas qualifications necessary under 46 C.F.R. 10.15-29 and 10.15-31 to secure a license or certificate, and

b. That one watch (8 hours per day) had been commanded by an "officer" without the high seas experience and other qualifications necessary under 46 C.F.R. 10.15-29 and 10.15-31 to secure a license or certificate, and

c. The tug under the direction of the unlicensed "master" had left a place of safety with

her tow without repairing the broken "fairlead traveler" of her towing engine, a device provided to enable the tow to reel in the towing cable, and

d. The tug under the direction of the unlicensed "master" had left a place of safety with no spare towing cable of adequate length (one towing cable having previously parted in moderate weather), and

e. The tug under direction of the unlicensed "master" had for 36 hours effectively ignored the radio warnings it had received of the approach of the storm which ultimately placed the tow in the peril requiring the "salvage" services, and

f. The tug owner had contracted to "use its best efforts" to tow the dead ship safely to destination, and

g. That the month of November, when the tow was performed, is recognized as a stormy season off the North Pacific Coast when gales are to be expected?

3. In an admiralty case what weight, if any, may a Court of Appeals accord the "finding of fact" of the trial Court where it clearly appears from the record

a. That the trial Court has accepted without change the "findings" proposed by prevailing counsel, and

b. That the critical "findings of fact" are "conclusions of law" phrased as "findings of fact" by prevailing counsel for "appeal proofing" and so adopted unchanged by the trial Court, and

c. That the "findings of fact" as proposed by prevailing counsel and adopted unchanged by the trial Court are (1) in conflict with the trial Court's memorandum opinion, (2) contrary to the record, and (3) for purposes of "appeal proofing" omit necessary findings of fact required by the Court's opinion and the record?

4. In an admiralty case may the Court of Appeals affirm on the basis of "appeal proofing" findings of fact not supported by the record a case decided by the trial Court as a question of law without passing on the question of law?

5. May a tow recover from its tug the damage and expense incurred by the tow by reason of exposure to peril where the tow proves that the "master" of the tug in violation of statute held no license and lacked the high seas experience to secure a license and that in violation of statute an unlicensed person (without the high seas experience necessary to secure a license) commanded a watch, in the absence of proof by the tug owner that its statutory fault not only did not but could not have contributed to the tow's peril? (The tug has asserted other collateral defenses to this phase of the case and if this question

is answered in the affirmative the case may properly be remanded to the Court of Appeals for the Ninth Circuit for further proceedings, although the record before this Court is complete for determination of all questions.)

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue for the following reasons:

(1) The Court of Appeals for the Ninth Circuit has effectively held that the rule of the *Pennsylvania* case (1874), 86 U.S. 125, does not apply where a tug guilty of statutory fault is claiming salvage from her tow, and thereby has decided an important federal question which has not been but should be decided by this Honorable Court.

(2) The Circuit Court has decided an important question of federal law in conflict with decisions applying the rule of the *Pennsylvania* case for various statutory violations in the Supreme Court of the United States.

> *The Martello,* 153 U.S. 64, 38 L. Ed. 637 (Collision in dense fog):
>
> "There can be no doubt that the Willey was guilty of a statutory fault in the failure to provide herself with the fog horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. *This is a presumption which attends every fault connected with the management of the vessel,*

> *and every omission to comply with a statutory requirement,* or with any regulation deemed essential to good seamanship." (Italics supplied.)

(3) The decision in this case is in direct conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of *Carr v. Hermosa Amusemeni Corp.,* 137 F. 2d 983.

(4) The decision in this case is in conflict with decisions in other circuits in which failure to comply with statutory requirements respecting manning has been held to constitute statutory fault.

The Henry O. Barrett (C.C.A. 3, 1908), 161 Fed. 481:

> A collision occurred between the towed Henry O. Barrett and the anchored dredge Columbia. The towing tug was held at fault under the *Pennsylvania* rule because an unlicensed man was in charge of the mate's watch.

The City of Baltimore (C.C.A. 4, 1922), 282 Fed. 490:

> A collision case. One vessel was at fault because she was being navigated by a person without a master's license.

Martin Marine Transportation Co. v. U. S. (C.C.A. 4, 1950), 183 F. 2d 676:

> Collision involving barges not carrying a full complement in crews, in violation of certain statutes.

(5) The Court of Appeals failed to apply the *Pennsylvania* rule, and without review, consideration

or question accepted the trial Court's statement that if the *Pennsylvania* rule be deemed to apply the burden of proof thereunder had been met by respondents. This was error. Not only did the tug master fail to have a proper license, he failed to have the qualifications necessary to obtain such license, and, even more important, his conduct of the tow and his determinations on various matters requiring exercise of discretion affirmatively established lack of judgment and experience to be expected of a properly licensed master.

As stated by Pope, Circuit Judge (R. 480), the finding that the burden of proof rule of the Pennsylvania has been met "* * * is manifest error," and "* * * it is simply impossible to conclude that the master's lack of qualifications 'could not have contributed' to the loss." In so erring the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(6) In accepting without comment or question the District Court's "findings of fact" as prepared by prevailing counsel despite their conflict with the record and opinion and critical omissions for "appeal-proofing" purposes, the Court of Appeals has so failed in its functions of review in an admiralty case as to require an exercise of this Court's power of supervision.

(7) In affirming on the basis of fictional "findings of fact" devised as "appeal-proofing" by prevailing

counsel a case patently decided by the District Court as a question of law without passing on that question of law the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(8) The granting by the Court of Appeals for the Ninth Circuit of full weight to unfair "findings of fact" prepared by prevailing counsel as "appeal-proofing" gives rise to a conflict with the Second Circuit in which such "findings" are accorded little or no weight (*City of New York v. McLain Lines,* (C.A. 2, 1945), 147 F. 2d 393), with the Fourth Circuit where such "findings" receive less weight and dignity (*The Severance* (C.A. 4, 1945), 152 F. 2d 916), and with the Seventh Circuit which holds such "findings" entitled to no weight (*Process Engineers v. Container Corporation* (C.A. 7, 1934), 70 F. 2d 487; Cert. den. 293 U.S. 588).

(9) In holding that the trial Court's "findings of fact" relating to lack of negligence, possible causation and extent of the tug's contractual obligation, were presumptively correct and not subject to review in the absence of clear error, the decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the Court of Appeals for the Second Circuit (*Sternberg Dredging Co. v. Moran* (C.A. 2, 1952), 196 F. 2d 1002, 200 F. 2d 603; *A&P v. Brasilero* (C.A. 2, 1947), 159 F. 2d 661; Cert. den. 331 U.S. 836; *Blumenthal v. Atlantic Coast Line Ry. Co.*

(C.A. 2, 1943), 139 F. 2d 288; Cert. den. 321 U.S. 795), and the Court of Appeals for the Fourth Circuit (*Bonnewell v. U. S.* (C.A. 4, 1948), 170 F. 2d 411). The present admiralty case was of course tried by the judge without a jury and the "findings" in dispute related to matters as to which there was no conflict in evidence. The Second and Fourth Circuits hold that in such circumstances "findings" as to negligence, standard of care and causation are in actuality "conclusions of law" entitled to no weight because misnamed "findings of fact" by the trial Court and requiring full review by the Appellate Court.

Wherefore petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court in this case, and submits, attached hereto, its brief in support of this petition.

Dated, San Francisco, California,
March 9, 1953.

Respectfully submitted,
CLARENCE G. MORSE,
Proctor for Petitioner.

GRAHAM & MORSE,
FRANCIS L. TETREAULT,
Of Counsel.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Clarence G. Morse, being first duly sworn, upon his oath deposes and says:

That he is one of the attorneys for petitioner in the above entitled cause; that he has read and considered the foregoing petition and the attached supporting brief and is familiar with the contents of said petition and brief; that in affiant's judgment the said petition is well founded in point of law as well as in fact, and the same is not interposed for delay.

CLARENCE G. MORSE.

Subscribed and sworn to before me this 9th day of March, 1953.

(Seal) HELEN E. WALSH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires October 22, 1954.

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WATERMAN STEAMSHIP CORPORATION, a corporation,
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SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C. Sec. 1254(1). The final decision of the Court of Appeals for the Ninth

Circuit was made and entered on Oct. 30, 1952 (R. 437) and the order denying a rehearing was made and entered on Dec. 22, 1952 (R. 479). This petition will be filed within the ninety-day period allowed by 28 U.S.C. Sec. 2101. The jurisdiction of this admiralty matter existed in the United States District Court under the provisions of 28 U.S. Code Sec. 1333(1). Appeal jurisdiction of the Court of Appeals for the Ninth Circuit existed under 28 U.S.C. Secs. 1291 and 2107.

OPINIONS OF THE COURTS.

The memorandum opinion of the trial Court (R. 38) is reported in 98 Fed. Supp. 123. The final decree was made June 20, 1951 and entered June 21, 1951 (R. 70-72). The per curiam opinion of the Court of Appeals for the Ninth Circuit was made and filed Oct. 30, 1952 (R. 434-436) and is reported in 199 F. (2d) 600. The judgment of the Court of Appeals for the Ninth Circuit was filed Oct. 30, 1952 (R. 437). The petitioner timely filed its petition for rehearing (R. 439) and the Court of Appeals for the Ninth Circuit denied said petition on December 22, 1952 (R. 479) with Pope, Circuit Judge, filing a dissenting opinion (R. 480-481).

STATEMENT OF FACTS.

Respondent Shipowners contracted to provide the tug SEA FOX or the tug SEA PRINCE and to

use its "best efforts" to tow the SS HERALD OF THE MORNING, a "dead" ship from San Francisco Bay to Everett, Wash. (R. 290). The SEA FOX and HERALD departed from San Francisco Bay on November 5, 1948, and on the second day in moderate weather (R. 108) the towing wire broke and the SEA FOX being unable to put a spare towing wire aboard (R. 233), another tug was sent out from San Francisco Bay, which towed the HERALD to the nearby Drakes Bay (R. 233). In attempting to handle her spare towing wire, the SEA FOX broke the fitting of her towing engine which is used in reeling in the towing wire (R. 58), and also jettisoned her spare, full-length towing wire (R. 109-110). At Drakes Bay on November 8, 1948, the towing wire was transferred to the SEA FOX from the other tug (R. 233-234) but the defect in the SEA FOX's towing engine was not repaired and the SEA FOX was not furnished with a spare, full-length towing wire (R. 109). The SEA FOX and HERALD departed Drakes Bay and several days later, after the SEA FOX on Nov. 12 and 13 received storm warnings by radio (R. 194) ran into a severe storm on Nov. 15 (R. 163-164). The HERALD again broke adrift on Nov. 16 (R. 124) and salvage services were rendered to the HERALD by various government and private vessels.

A more detailed chronological statement of the facts is set forth in Appendix "A" attached hereto.

The master of the tug SEA FOX, R. T. Sommer, held no license enabling him to serve as master of

the tug SEA FOX on the high seas (R. 245) and lacked the high seas experience that would be necessary to secure such a license. In so serving as master and in himself standing a watch (R. 298), Mr. Sommer (and respondents) acted in violation of the International Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers, 54 Stat. at L., Pt. 2, P. 1683 (effective in the United States October 29, 1939), set forth *in extenso* in Appendix "D"; Administrative and Penalty Provisions, 46 U.S.C. 224(a), et seq., set forth *in extenso* in Appendix "E".

A libel *in personam* to recover a salvage reward for services rendered to the HERALD after she broke adrift the second time was filed by Shipowners on behalf of the tug SEA FOX and its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug and Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs. The trial Court concluded "that the lack of an unlimited master's license on the part of Captain Sommer did not and could not have contributed to the plight of the HERALD; that the HERALD went adrift and into a position of grave danger solely by reason of the violence of the storm; * * * that the HERALD went adrift in said gale without fault or negligence on the part of anyone." (R. 66). The award of $22,250 to the owner and crews of the tugs NEPTUNE and HERCULES was paid promptly and in full. Being gravely aggrieved by the award of $24,750 to Shipowners as salvage in addition to

$5,750 previously paid under the towage contract and the denial of recovery from Shipowners for Waterman's heavy damages and expenses, Waterman appealed to the Court of Appeals for the Ninth Circuit and has now taken this petition to this Honorable Court.

SPECIFICATION OF ERRORS.

The Court of Appeals made four fundamental errors. The errors were cumulative. The first three errors inevitably gave rise to the fourth error which resulted in a holding in conflict with every decision on similar issues made by other Circuit Courts and this Court for the past 75 years. The Court of Appeals erred in:

(1) Giving full weight to unfair "findings of fact" prepared by prevailing counsel as "appeal-proofing" despite their conflict with the record and opinion and critical omissions for "appeal-proofing" purposes.

(2) Giving weight to and considering as "findings of fact" the trial Court's conclusions (a) that the HERALD went adrift solely by reason of the violence of the storm, (b) that the SEA FOX incurred risks and performed services beyond the scope of her towage contract, (c) that the danger to the tow was not occasioned or contributed to by any negligence of the tug, and (d) that the statutory fault of Shipowners in failing to provide a licensed and qualified master could not have contributed to the peril since the HERALD went adrift solely by reason of the

violence of the storm,—despite the fact that the evidence affecting the issues in question was without conflict and despite the fact that the trial Court in its opinion had clearly stated its holding on (b) as a conclusion of law and its holdings on (a) and (d) as dictum.

(3) Failing to hold that the statutory fault of Shipowners in failing to provide a licensed and qualified master placed upon Shipowners the burden under the *Pennsylvania* (1874) 86 U.S. 125 of proving that its fault not only did not but could not have contributed to the danger of the HERALD and in failing to hold that Shipowners had failed to sustain its burden of proof thereunder.

(4) Holding that a tow must pay full salvage to its tug and may not recover damages from the tug where on the tug's uncontested evidence it appears: that in violation of statute the tug had no licensed master and had one watch commanded by an unlicensed unqualified officer; that the tug left a place of safety with its tow with the fairlead traveller, a part of its towing engine necessary for heaving in the towing hawser, broken and of no use; that the tug for more than 36 hours wholly ignored radio warnings of the approach of the gale which eventually broke the tow adrift; that the tug had left a place of safety with no spare towing hawser of adequate length; and that all of the foregoing occurred in the North Pacific in the month of November which is recognized and known as a place and season where violent storms are to be expected.

ARGUMENT.

FIRST AND SECOND SPECIFICATIONS OF ERROR.

THE COURT OF APPEALS ERRED IN GIVING WEIGHT TO SO-CALLED "FINDINGS OF FACT" WHICH WERE (1) MERE APPEAL-PROOFING OR (2) CONCLUSIONS OF LAW.

This case should present one question and one question only. That question is whether the rule of the *Pennsylvania* case (1874) 86 U.S. 125 applies to a tug and dead tow situation and places upon the tug the burden of proving that its admitted statutory fault in going to sea with an unlicensed and unqualified master not only did not but could not have contributed to the placing of the tow in a situation of peril requiring the rendition of "salvage" services. There is no question about the statutory fault. Likewise, on the record, if the *Pennsylvania* rule applies there is and can be no question that the tug (respondent Shipowners) has not and cannot carry its burden of proof.

We do not believe that any reasonable man reading the record could say that Shipowners had carried a burden of proving that the lack of a licensed and qualified master *did not* contribute to the tow's peril.

We state unequivocally that no reasonable man can read the record and say that Shipowners has carried a burden of proving that the lack of a licensed and qualified master on the tug *could not* have contributed to or caused the tow's peril. As Judge Pope said in his dissenting opinion on the petition for rehearing (R. 481):

> "* * * it is simply impossible to conclude that the master's lack of qualifications 'could not have

contributed' to the loss or the situation which gave rise to the necessity of salvage."

The ultimate question presented by this petition is important and clear-cut. Petitioner, however, was deprived of a consideration of that important question by "appeal-proofing" findings of fact and by conclusions of law phrased as findings of fact which misled the Court of Appeals into considering the question presented by the appeal to be a question of fact (R. 435).

The first two specifications of error which we here discuss are directed solely to those errors of the Court of Appeals in permitting itself to be misled by the beguiling but specious "findings of fact" presented to it by the trial Court for review.

Every "finding of fact" upon which the Court of Appeals relied was either "appeal-proofing", drafted by prevailing counsel and adopted without change by the trial Court despite omissions, conflicts with the record and the opinion, or was a "conclusion of law" rephrased as a "finding of fact" by prevailing counsel for the purpose of "appeal-proofing".

A. Contested "findings of fact" were conclusions of law and should have been reviewed de novo.

Although one could never discover such from the "findings of fact", the case was decided by the trial Court as a question of law—the same question as to which we in vain attempted to secure a review in the Court of Appeals and which we are now present-

ing. We quote from the comments of the trial Court at the hearing on "settlement of findings" (R. 471):

> "To be frank with you, the only thing that bothered me in the case at any time—I say this kindly—was that the Pennsylvania doctrine has no application here. I at last determined that it did not, and the Circuit Court may take a different view; I don't know."

At the trial the only issues as to which there was any conflict in the testimony related to the violence of the weather and the extent of the peril of the tow. There was no conflict as to the events which took place aboard the tug since all such testimony necessarily came from the crew of the tug. The "findings" which we assert the Court of Appeals erroneously treated as factual rather than as conclusions of law all concern issues as to which there was no conflict in the evidence. We refer to the "findings" appearing on page 66 of the record. These may be summarized as follows:

(a) The failure to provide the tug with a licensed master did not and could not have contributed to the plight of the HERALD.

(b) The HERALD went adrift and into a position of danger solely by reason of the violence of the storm.

(c) The HERALD went adrift in the gale without fault or negligence upon the part of anyone.

(d) After the towing hawser parted the tug SEA FOX performed services to save the HERALD which were not within the scope of the tug's original contract.

Each of the foregoing "findings" should have been given full review by the Court of Appeals as a *conclusion* of the trial judge on undisputed evidence. It is clear that in the Second Circuit and the Fourth Circuit such "findings" would have been accorded no weight but would have been given full review as the "conclusions of law" they are.

The strikingly similar factual situation of a tow damaged by its tug encountering heavy weather was before the Court in *Blumenthal v. Atlantic Coast Line Ry. Co.* (2 C.A. 1943), 139 F. (2d) 288, cert. den. 321 U.S. 795 and we quote:

> "Upon this appeal it insists that there are no disputed questions of fact, and that, as the decision below was not 'clearly erroneous' we have nothing to review. That depends upon whether we are to call the proper standard of care a question of fact. In cases tried to a jury it is indeed treated as such, although obviously it is not a question of fact, for it measures the duty and liability which the law imposes; upon appeal in a case tried to a judge we think it should not be so regarded. As we view it therefore, the cause comes before us as it did before the district judge; like him we have only to decide what measure of care the situation imposed * * *
>
> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."

Likewise in the Second Circuit and to the same effect confirming the view that "findings of fact"

relating to negligence, lack of negligence and causation are in actuality "conclusions of law" requiring review as such are *A&P v. Brasilero* (2 C.A. 1947), 159 F. (2d) 661, cert. den. 321 U.S. 795, and *Sternberg Dredging Co. v. Moran Towing and Transp. Co.* (2 C.A. 1952), 196 F. (2d) 1002, rehearing denied, 200 F. (2d) 603.

In the Fourth Circuit it likewise is the rule that questions of negligence based on undisputed facts are as freely reviewable in the Appellate Court as are conclusions of law. *Bonnewell v. U. S.* (4 C.A. 1948), 170 F. (2d) 411.

B. The so-called "finding of fact" that the statutory failure of the tug to provide a licensed and qualified master could not have contributed to the tow's danger since the HERALD went adrift solely by reason of the violence of the storm (R. p. 66) is patently a conclusion of law and an erroneous one.

> In Edward the First's time some of the cases remind us of the barbarian laws at their rudest stage * * * If a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. *The Common Law,* p. 24, O. W. Holmes.

The trial Court gratuitously and as dictum threw into its memorandum opinion a comment to the effect that the HERALD had been set adrift solely by the violence of the storm (R. p. 51). The tug interests seized upon this gratuitous and horseback conclusion, converted it into a "finding of fact" and relied upon it as the primary bulwark in their magnificent "appeal-proofing" edifice, which in the absence of review

by this Court will continue to stand as a monument to the proposition that no litigant need fret lest the law be against him if only his counsel can have a free hand in drafting the conclusions of law as "findings of fact".

The "finding of fact" in question is patently a conclusion of law and a conclusion based on a spectacularly primitive view of the law which was repudiated more than three centuries ago. Long before 1773 when the famous *Squib* case (*Scott v. Shepherd,* 2 Wm. Bl. 892) was decided the law was settled that legal causation is not limited to that event which is closest in time.

Questions of causation, and *a fortiori,* questions of possible causation such as are presented by this so-called "finding" are questions of law, which again, because of Shipowners' "appeal-proofing", was understandably but mistakenly viewed by the Court of Appeals as a question of fact and for that reason not reviewed.

The proper rule was well stated by Lord Shaw of Dunfermline for the House of Lords in *Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Soc.* (1918), A.C. 350:

> "To treat proximate cause as the cause which is nearest in time is out of the question. Causation is not a chain; it is a net. At each point influences, forces, events precedent and simultaneous meet; and the radiation from each point extends infinitely."

Here there is no reason for confusing law with fact as sometimes necessarily occurs when a case is tried to a jury. Here the case was tried to the Court and the disputed "finding" is based on uncontested evidence. The conclusion is necessarily a conclusion of law, and a erroneous one.

As the Second Circuit in *Blumenthal v. Atlantic Coast Line Ry. Co.* (2 C.A. 1943), 139 F. (2d) 288, cert. den. 321 U.S. 795 said in reversing the trial Court despite "findings" that the loss had occurred through an act of God and that there was no negligence:

> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."

We frankly admit that the towline probably would not have parted if the HERALD and the SEA FOX had been lying quietly in a landlocked harbor on a calm day.

On the other hand in the present state of the law of causation we find incredible the trial Court's conclusion that the lack of a licensed master "could not" have contributed to the loss in the face of the uncontested testimony of the tug-owner's own witnesses that radio storm warnings were effectively ignored for 36 hours, that he set out from a place of safety without repairing the broken fairlead traveller of his towing engine (necessary to heave in the towing hawser), without a spare towing cable of practicably

usable length, where it does not appear from the record that the master had the high seas experience necessary to secure a certificate under the statute or even that he understood the interpretation and use of weather bulletins, as would have been required of him if he were to obtain a certificate as required under the statute.

C. The contested "findings of fact" are patent "appeal-proofing" in conflict with the opinion and record and replete with omissions of facts required by the opinion and the record to be stated. As such they are entitled to no weight and in the Second and Fourth Circuits would have been discounted.

We do not claim that the District Court intentionally miscast its findings in order to deny petitioner its right to a fair review. We do assert unequivocally and with no reservation that by permitting the tug owner to draft "findings" as it pleased the District Court invited the error which was made by the Court of Appeals and in the absence of review by this Court permitted petitioner to be deprived of its appeal by astute legal draftsmanship.

This problem regrettably is not a novel one, but in other circuits it is settled that "findings of fact" so prepared by prevailing counsel and accepted by the trial Court without modification (cf. R. pp. 465-477) despite critical omissions and conflicts with the opinion and the record are entitled to little or no weight.

"Findings" so prepared do not facilitate the work of the Appellate Court but rather add to it, and in some instances such as the present case so add

to the burden of the Appellate Court as to wholly prevent it from performing its duty of reviewing important questions of law. It has not thus far to our knowledge, however, been held that the losing party in the trial Court must suffer by reason of such fictional "findings of fact". If such a holding were ever made it would be a frank admission that the right of appeal is meaningful only where the findings in the trial Court are made by a diligent and conscientious Court and/or successful counsel is incompetent.

"Findings of fact" of this non-realistic type prepared by prevailing counsel have received attention and properly scathing comment in the Seventh Circuit where they are entitled to no weight (*Process Engineers v. Container Corporation* (C.A. 7, 1934), 70 F. (2d) 487, cert. den. 293 U.S. 588, and also in the Fourth Circuit which holds such findings are entitled to little or no weight (*The Severance* (C.A. 4, 1945), 152 F. (2d) 916). The Second Circuit has reached the same result in *City of New York v. McLain Lines* (C.A. 2, 1945), 147 F. (2d) 393.

The Supreme Court in *U. S. v. Crescent Amusement Co.*, 323 U.S. 173, 89 L. Ed. 160, cited with approval, but did not expressly pass on the point, the opinion of the Second Circuit in *U. S. v. Forness* (C.A. 2, 1942), 125 F. (2d) 928 at 942, in which Judge Frank commented with vehemence upon a similarly distasteful incident, saying:

> "In the instant case, a comparison of the findings with the opinion seems to show that the findings

proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the District Court are not supported by the evidence and not substantially in accord with the opinion * * * We stress this matter because of the grave importance of fact finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. * * *"

D. Comparative listing of critical conflicts between so-called "findings" and the record and opinion.

We list herewith a few critical examples comparing the "findings" as prepared by prevailing counsel and adopted without change by the trial Court with the equivalent portions of the opinion and record:

(1) Fouled towline on November 7, 1948.

Finding (R. p. 58): "Thereafter the SEA FOX succeeded in passing her spare steel hawser to the HERALD; this hawser fouled in the winch drum of the towing engine and had to be severed and *all but 600 feet of it was dropped overboard.*"

Opinion (R. p. 40): "On the following day the SEA FOX succeeded in passing its spare full length tow wire to the HERALD. This, however, fouled on the winch drum of the tug's towing engine and had to be cut off and dropped into the sea."

Record (Testimony of libelant Reichel, R. pp. 109-110):

A. * * * And we placed another hawser up at that time on the ship, and then we lost that hawser too, and so that left us with the hawser from the SEA PRINCE plus our short hawser.

Q. You didn't lose the second hawser? It just fouled on the drum?

A. But it wasn't of any use. We had to cut it, to get that off the drum completely.

Q. Then what did you do with that?

A. We dropped it overboard.

(2) High seas experience of Mr. Sommer.

Findings (R. p. 65): Captain Sommer had considerable experience as a master of tugs in ocean towing and during the year 1948 *prior to* the towage of the HERALD was the master of the SEA FOX while she was engaged in safely towing eight vessels on the Pacific Coast between San Francisco and the State of Washington and intermediate ports, three of which were precisely like the HERALD and of the same dimensions * * * Captains Sommer and Reichel were experienced tugboat men and each of them impressed the Court as able, competent, courageous and truthful mariners.

Opinion (R. p. 40): "All three (referring to Mr. Sommer, Mate Reichel and Mate Harris) were experienced and competent men."

Record (Testimony of Mr. Sommer, R. pp. 231, 232):

Q. How long have you been on the SEA FOX?
A. About six years.
Q. And where? Did you have any regular run?
A. No, just towing around the Bay.

Record (Testimony of Mr. Sommer, R. pp. 245-246):

Q. You have a master's license?
A. Limited.
Q. Limited?
A. Limited.
Q. Limited to what area?
A. San Francisco Bay and tributaries.
Q. You do not——
A. Lakes and sounds.
Q. You do not have a master's license permitting you to——
A. No.
Q. ——be captain of ocean-going vessels?
A. No.

Record (R. p. 246):

Q. Was this, the occasion of this incident, the first time you served as master of an ocean-going tug?
A. No, no.
Q. How many voyages?
A. I had about 16 trips up the coast, 16 or 17.
The Court. 16 trips up the coast.
Q. (By Mr. Morse). Prior to the HERALD OF THE MORNING trip?
A. I towed four ships up the coast before that.

Q. Did you take two other similar vessels to the HERALD OF THE MORNING up in 1948?

A. Yes, sir.

(3) Causation under the Pennsylvania rule.

Finding (R. pp. 65-66): "That nothing that Captain Sommer did or failed to do contributed in any way to the situation which gave rise to the necessity for the rendition of salvage services to the HERALD; that the lack of an unlimited master's license on the part of Captain Sommer did not and could not have contributed to the plight of the HERALD; the HERALD went adrift and into a position of grave danger solely by reason of the violence of the storm; that the parting of the hawser of the SEA FOX in the full gale on November 16, 1948 was an event over which neither Captain Sommer nor any other human had or could have any control; that the HERALD went adrift in said gale without fault or negligence upon the part of anyone."

Opinion (R. p. 51): "Assuming, however, that in this case the rule is applicable, the burden of proof has been carried because the evidence clearly shows that the HERALD was set adrift and carried into a position of danger solely by the violence of the storm."

Record: All evidence in the record is in direct conflict with both the finding and the opinion on this point, except in so far as the opinion is an erroneous conclusion of law. This is discussed further hereinafter.

(4) Tug's obligation under her towage contract.

Finding (R. p. 66): "That the SEA FOX thereafter incurred the aforementioned risks and performed the aforesaid duties and services which were not within the scope of her original towage contract."

Opinion (R. pp. 47-48): "Respondent argues that strong winds and heavy seas are apt to be encountered along the North Pacific coast in the month of November and that, therefore, they must have been in the contemplation of the parties to the towage contract. If this argument were sustained it would mean that a tug would be held strictly to its contract no matter how extraordinary and hazardous its efforts to save its tow imperiled by the violence of wind or waves. The Court does not believe that such a holding would be consonant with maritime policy or with the legal principles set forth above."

Record: Here, again, we find that while the trial Court honestly stated its decision on this phase of the case as a matter of "policy" and as a conclusion of law in its opinion, the appellee, as a matter of "appeal-proofing" restated the decision on the same important phase of the case as a "finding of fact". The record itself serves only to support the fact that the weather which was encountered was well within the contemplation of the parties at the time of entering into the contract.

(5) Total value of all salvage services.

Finding: No mention.

Opinion (R. p. 46): In view of all the evidence, therefore, the Court estimates that the total salvage should be considered at the sum of $60,000.00, provided all the salvors who rendered service claimed and were entitled to claim pay for their services.

Record: We believe the record, in view of the discretion afforded the trial Court in such matters, supports the holding indicated in the opinion, although we consider the amount to be liberal. The failure to include an equivalent "finding" despite appellant's urging (cf. R. p. 469) constitutes further "appeal-proofing" tending to make it impossible for appellant to urge on appeal that the award given the SEA FOX vis-à-vis the Government vessels was excessive.

E. In view of the trial Court's express ruling that the tug's statutory fault did not cast on it the burden of proving lack of possible causation petitioner was entitled to a review of this holding by the Court of Appeals and to a review de novo of the "factual" holding by the trial court on its "but if" dictum since all evidence on this issue was uncontested testimony of tug's own witnesses.

Traditionally admiralty trials were largely by deposition, and traditionally on appeal the review was in the nature of a trial *de novo.* In recent years the trial Court in admiralty cases more frequently hears live witnesses and the Appellate Courts have become loath to substitute their judgment for the trial Court's on questions requiring the resolution of con-

flicts in testimony. The development is a proper and healthy one, but the development should not exceed the reason for it.

In the present case the trial Court in its opinion held that the burden of proof imposed by the *Pennsylvania* case on a vessel guilty of statutory fault did not apply to this case (R. p. 50 and p. 471). Having reached this conclusion and satisfied itself that the *Pennsylvania* rule does not apply to a tug and tow situation, the trial Court was in no position or climate of view to then give proper consideration to the *facts* on its gratuitous "but if" dictum premise that the *Pennsylvania* rule was imposed on the tug by reason of its statutory fault.

It is perfectly clear from the opinion (R. p. 50) and from the trial Court's statement to counsel (R. p. 471) that if the case had been tried to a jury the trial Court would have refused petitioner's instruction "The salvage claimant tug Sea Fox interests are guilty of statutory fault in that the master was not licensed and must prove that this fault not only did not but could not have contributed to the danger of the tow, resulting salvage services and expense."

In other words, if the case had been tried to a jury it is apparent that petitioner would have received from the Court of Appeals a review of the legal rule on which the case was decided. It was error on the part of the Court of Appeals, calling for exercise of the supervisory powers of this Court, to permit petitioner to be deprived of review of the rule of law

on which the case was decided merely because trial Court permitted prevailing counsel to prepare obfuscatory and misleading "findings."

We respectfully suggest that the reason for the rule that an appeal in admiralty constitutes a trial *de novo* is to prevent undue weight from being given to "findings" which actually are based on and are expressions of the application of erroneous rules of law. The present case is perhaps an extreme and flagrant example but the very nature of the subject matter of most admiralty litigation gives in a majority of cases an unusual importance to the question of burden of proof, a question of law, and we suggest that in only unusual instances can an Appellate Court tell from the opinion, findings and conclusions, without reviewing the record, upon what rule of burden of proof the trial Court has decided the case.

In the present case, after satisfying itself that the *Pennsylvania* rule does not apply to statutory fault of a tug in a tug and tow situation the trial Court by way of a "but if" dictum in its opinion stated that if the rule applied the tug had carried its burden of proving that the lack of a licensed master could not have contributed to the danger of the tow (R. p. 51). We have heretofore shown that this conclusion was a conclusion of law and as such entitled to review by the Court of Appeals. In any event the conclusion concerned only matters as to which there was no conflict in testimony, all of the evidence on which petitioner relied necessarily being the evidence

produced by the tug's own witnesses, and as such petitioner in this admiralty case was entitled to a review *de novo.*

With respect to its contention that the lack of a licensed master not only could have but probably did contribute to the tow's danger petitioner relied on the following uncontested evidence and testimony:

> The Sea Fox left Drake's Bay, a place of safety, without repairing its fairlead traveller, the device which enables its towing engine to heave in on the towing cable (Sea Fox Log, Exhibit A, not printed, R. p. 372).
>
> The Sea Fox on the morning of November 13, 1948, received radio warning of approaching storm (testimony of libelant Reichel, R. p. 194) but did nothing to all intents and purposes until 4:20 p.m. November 14th when it radioed the Coast Guard for assistance (testimony of libelant Reichel, R. p. 171).
>
> On November 7 in relatively moderate weather the towing hawser had broken. The Sea Fox then put into Drake's Bay, a place of safety, in the meantime having fouled and destroyed her spare towing cable or "insurance wire" and on November 9 the Sea Fox left Drake's Bay with the tow but without any spare towing cable of usable length (testimony of libelant Reichel, R. pp. 109-110).

It was and is petitioner's contention that no licensed and qualified master would have permitted the tug and tow under his command to do any of the foregoing. The listing is not exhaustive, and cannot be

since what happened on the tug is peculiarly within the tug's knowledge, but the items we have specified are based on unconflicting testimony and evidence and the Court of Appeals is as capable of considering such with respect to petitioner's contention that the lack of a licensed master could have (and probably did) contribute to the danger of the tow as was the trial Court. Such being the case the Court of Appeals was bound to review the uncontested facts in light of the contention, and it was gross error for the Court of Appeals to rely without inquiry, as it did, on the "findings" of the trial Court (R. p. 436).

SECOND AND THIRD SPECIFICATIONS OF ERROR.

THE COURT OF APPEALS IN HOLDING THAT A TUG EMPLOYING AN UNQUALIFIED MASTER IN VIOLATION OF STATUTE MAY COLLECT SALVAGE FROM HER TOW, AND THAT THE TOW MAY NOT COLLECT DAMAGES FROM THE TUG, WHERE ON THE ADMITTED FACTS THE LACK OF A QUALIFIED TUG MASTER COULD HAVE CONTRIBUTED TO AND CAUSED THE TOW'S PERIL, HAS PROMULGATED A VICIOUS RULE OF GREAT IMPORTANCE.

(a) The Pennsylvania rule; the novel and vicious precedent of this case; the conflict between Circuits.

The Court of Appeals considered the case "essentially one of fact" (R. p. 435) and apparently did not consider that its *per curiam* opinion would be of major significance in stating (or revising) the law. The major issue presented here, and also the major issue presented to the Court of Appeals, by a ratio of two to one in pages of briefing, concerns the extent of

the burden of proof to be carried by a tug attempting to claim salvage from her tow when a fundamental statutory fault has been proved against the tug. The great importance of the decision on this point is indicated by the numerous inquiries we have received from attorneys in all maritime cities, including the Great Lakes, concerning this case with respect to litigation in which they are presently involved. We assume prevailing counsel have received at least an equal number of inquiries.

It is fundamental that a tug may not claim salvage from her tow unless the tug proves (1) that her services and the hazard were not within the contemplation of the contract and (2) that no fault or deficiency of the tug could have contributed to the danger of the tow requiring the "salvage" services.

The first of the mentioned rules is aptly restated in the International Salvage Convention text at 37 U.S. Stat. at L., page 1670, effective in the United States March 1, 1913 as follows:

> "Article IV *Tugs.*
>
> "A tug has no right to remuneration for assistance to or salvage of the vessel she is towing or of the vessel's cargo except where she has rendered exceptional services which cannot be considered as rendered in fulfillment of the contract of towage."

The second rule that a tug may not recover salvage from her tow if it appears that the fault of the tug may have contributed to the danger giving rise to the

"salvage" services is fundamental and is supported by all authorities which have considered the question.

The Krona (1886), 28 Fed. 318;

The Minnehaha, Lush., 335, 15 Eng. Reports, Full Reprint, p. 444;

The Clarita and The Clara, 1874, 90 U.S. 1, 23 L.Ed. 146.

The decision of the Court of Appeals in the present case effectively repudiates both of these fundamental rules. In addition, the Court of Appeals has effectively held that in a tug and tow situation so material a statutory fault as failing to provide a master possessing the license and qualifications required by statute does not cast upon the tug the burden of proof required by *The Pennsylvania* (1874), 86 U.S. 125, and uniformly applied by the Supreme Court and other circuits in similar factual situations. The Court of Appeals was not justified in repudiating these fundamental principles by any consideration of public policy and, indeed, made no attempt to justify its action on such grounds. The decision of the Court of Appeals is in open conflict with all considerations of sound public policy pertaining to relations between tug and tow. It constitutes a radical change in the basic law, as previously understood, governing the relations between tug and tow and for this reason has excited such extensive interest in the admiralty bar throughout the country.

In the *Pennsylvania* (1874), 86 U.S. 125, the Supreme Court of the United States held in a collision case that where there was statutory fault on the

part of one of the vessels, that vessel must prove not only that the statutory fault did not contribute to the accident but that it could not have contributed to the accident.

In the *Pennsylvania* (1874), 86 U.S. 125, the Supreme Court stated the extent of the application of the *Pennsylvania* rule as follows (emphasis supplied):

> "There can be no doubt that the WILLEY was guilty of a statutory fault in the failure to provide herself with the fog horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. *This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship.*"

No statute is more profoundly directed to the preservation of lives and property at sea than those statutes which require the licensing of masters. The qualifications and experience of the master of the vessel, or the lack thereof, are without question the single element which most profoundly tends to render the vessel seaworthy or unseaworthy. Virtually all cases decided since the *Pennsylvania* case have placed upon the vessel whose master or officers were not licensed as required by statute, the burden required by the *Pennsylvania* rule. We cite a few of such cases:

In *Carr v. Hermosa Amusement Corp.* (C.A. 9, 1943), 137 Fed. (2d) 983, cert. den. 321 U.S. 764, an

anchored fishing barge was held at fault with respect to loss of life of passengers aboard the barge who were thrown overboard as a result of collision, because of the barge's statutory fault in failing to have aboard a licensed master. It was held that the barge was unable to carry its burden of proving that a licensed master would not have been equal to the emergency of rescuing the passengers following the collision.

In his dissenting opinion in the instant case, Judge Pope, as do we, considers the opinion of the Court of Appeals in the present case to be a repudiation of the decision in *Carr v. Hermosa Amusement Corp.*

In the *Henry O. Barrett* (C.C.A. 3, 1908), 161 Fed. 481, cer. den. 212 U.S. 573, reversing the lower Court, the towing tug was held solely at fault for a collision between the towed Henry O. Barrett and the anchored dredge, Columbia, for statutory fault under the *Pennsylvania* rule in that the person in charge of the tug's deck watch was unlicensed in violation of statute.

In the *City of Baltimore* (C.C.A. 4, 1922), 282 Fed. 490, a tug was held at fault in a collision case under the *Pennsylvania* rule because she was in command of an unlicensed master, the Court saying:

> "She was being navigated by a person without a master's license, in a busy harbor, in open violation of the law applicable to her (Comp. St. Secs. 8190, 8200; Inspectors' Rules (1916) V, Sec. 19) and, in such circumstances, it is incumbent upon her to show, not only that the absence of a licensed master did not enter into the occurrence, but that it could not have done so * * *".

The strong presumption of fault attending the employment of a master, mate or pilot not licensed as required by statute was relied upon as a ground of decision in the following cases: The *John F. Tolle,* (Cir. Ct. E.D. La. 1881), 12 Fed. 444, in which case the acting pilot's license had expired eight months previously; The *J. C. Hartt,* (Dist. Ct. S.D. N.Y., 1924), 39 Fed. (2d) 923; The *Walter D. Noyes* (Dist. Ct. E.D. Va., 1921), 275 Fed. 690, in which case it appears that the person acting as master possessed the necessary qualifications, but his failure to secure a license as required by statute was regarded as inexcusable carelessness; and *The B. S. Ford—District of Columbia,* (D.C.E.D. Va.), 1937 A.M.C. 603, in which case it appears that the master held a master's license but not for the waters in question.

There is no conceivable basis in principle or in policy for exempting the factual situation in the present case from the operation of the *Pennsylvania* rule. In the present case the Court of Appeals has declined to consider that a tug guilty of statutory fault in having an unlicensed man serving as master must carry the burden imposed by the *Pennsylvania* case in defending the tow's claim for damages suffered by the tow and even further has effectively held *that a tug with an unlicensed person serving as master and guilty of statutory fault may recover salvage for services rendered to her tow without proving that the tug's statutory fault could not have contributed to the tow's danger.* This holding not only shocks the senses but is in direct conflict with the holding of the Third Cir-

cuit in the *Henry O. Barrett,* 161 Fed. 481, in which a tug, guilty of statutory fault in having an unlicensed officer standing the deck watch, was held liable to pay its tow for the damages sustained by the tow in a collision, the tug being unable to prove that its statutory fault could not have contributed to the collision. In principle there can be no possible distinction made between the hull damage suffered by the tow in the *Henry O. Barrett* and the heavy obligation incurred by the owners of the HERALD in the present case to pay salvage to other interests after being placed in a situation of danger by the actions of its tug under the direction of an unlicensed man.

Every consideration of principle and argument of policy that makes the application of the *Pennsylvania* rule to collisions between stranger vessels both necessary and beneficial applies with redoubled cogency to a situation such as the present in which a tug is claiming a bonus award for services to her tow. Every man aboard the tug was not only an interested witness but was also an actual beneficial libelant in pursuing the claim against the tow for a salvage award. On the other hand the men aboard the tug are the only possible witnesses who know or could know the details of what took place aboard the tug. In such circumstances, statutory fault having been proved against the tug, it is appropriate that the burden of the *Pennsylvania* rule be placed upon the tug if it is ever to be placed upon any vessel in any factual situation.

The decision and opinion of the Court of Appeals in this case treats the obligation of a tug to its tow

as non-existent and by refusing to apply the *Pennsylvania* rule gives two of the libelants, Shipowners and Mr. Sommer, a reward of $20,000 for their violation of a criminal statute. If the writ of certiorari is denied, the decision of the Court of Appeals will stand as a repudiation of the maxim of jurisprudence, stated among other places in Section 3517 of the California Civil Code: "No one can take advantage of his own wrong."

(b) On the uncontested facts of record, no reasonable man can say that respondent carried its burden of proof under the Pennsylvania rule.

> "* * * It is simply impossible to conclude that the master's lack of qualifications 'could not have contributed' to the loss or the situation which gave rise to the necessity of salvage."
>
> Pope, Circuit Judge, (R. p. 481).

It is petitioner's view that on the basis of the uncontested testimony of the tug it established faults on the part of the tug which were not explained and which gave rise to an inference of ultimate fault, even in the absence of proved statutory fault, under the principles discussed in *Sternberg Dredging Co. v. Moran Towing and Transportation Co.* (C.A. 2 1952) 196 Fed. (2d) 1002, 200 Fed. (2d) 603. It is not necessary for petitioner, however, to argue the rather difficult questions of "inference" and "burden of persuasion", since the statutory fault of the tug was clearly and conclusively proved, and on the uncontested facts of record it was impossible for the tug to carry its burden under the *Pennsylvania* rule of

proving that its statutory fault could not have contributed to the loss and the necessity for the salvage services.

The tug SEA FOX was a vessel of 282 gross registered tons (R. 56) and at all pertinent times was navigated on the "high seas". Mr. Sommer had no license to serve as master or navigating officer in charge of a watch except for San Francisco Bay and tributaries (R. 245). In Appendix "D" hereto, we set forth in full the provisions of the Officers' Competency Certificates Convention 1936 and in Appendix "E" hereto we set forth in full the administrative and penalty provisions 46 U.S.C.A. 224 A. It is perfectly clear that Mr. Sommer had no license or certificate as required by the convention and the penalty statute and that his serving as master of the SEA FOX, and also as navigating officer in charge of a watch, was in violation of both the convention and the penalty statute. This has been admitted, although the trial Court declined to amend the findings and conclusions prepared by prevailing counsel to show one way or the other.

It is equally clear that Mr. Sommer did not have the experience or other qualifications necessary to secure a competency certificate to serve as master of the SEA FOX on a trip from San Francisco to Seattle. In Appendix "F" hereto we set forth for ready comparison the Coast Guard regulations governing the issuance of (1) the license for inland waters, which Mr. Sommer held, and (2) the high seas license which under the statute Mr. Sommer was re-

quired to have to serve as master or as officer in charge of a watch on the SEA FOX during the voyare in question. A brief review of Appendix "F" readily discloses the extensive and far-reaching nature of the qualifications which Mr. Sommer *should have had* over those which he did have.

Of particular interest is the fact that for a master's license under the convention, the regulations (46 C.F.R. 10.15-29, cf. App. "F") require four years service *at sea* of which one year must be as a licensed mate or equivalent.

With regard to his actual experience, Mr. Sommer testified in response to questions by the Court (R. 231-232):

"Q. What is your business or occupation?

A. Captain of a tug—the tug SEA FOX.

Q. How long have you been on the SEA FOX?

A. About six years.

Q. And where? Did you have any regular run?

A. No, just towing around the bay."

It is also important to note that in order to have secured a master's certificate under the convention, Mr. Sommer under the regulations (46 C.F.R. 10.15-31, cf. App. "F") would have had to demonstrate proficiency in:

Meteorology, use and reading of weather bulletins;

Keeping a ship's head to sea in heavy weather with engines broken down; * * *

Nowhere in the record does it appear that Mr. Sommer had even rudimentary knowledge or experience in interpreting and applying the information contained in the more or less technical weather bulletins used for high seas navigation. Nowhere in the record does it appear that Mr. Sommer understood the significance of the radio weather bulletins received by the SEA FOX on November 12 and 13 (set forth in full Appendix "C", being excerpts from Respondent's Exhibit J not printed) and from the actions of the tug after receiving such bulletins it would appear that they were not understood.

The lack of high seas experience on the part of Mr. Sommer acting as master of the tug was of extreme importance, and even if such lack of high seas experience were not related to statutory fault, as it is, it should cast upon the tug the burden of proving that the master's deficiencies could not have contributed to the tow's perils. There is no indication in or out of the record that Mr. Sommer had ever been off the North Pacific Coast in the stormy winter months or even that he had ever been outside of San Francisco Bay in any except the calmest seasons of the year, except for one trip from San Francisco, California to Eureka, California with an oil barge in the month of October. There is no indication that Mr. Sommer had any experience or personal knowledge of the type of conditions that were to be expected in a storm off the North Pacific in the month of November, and as a result there is no indication that he felt constrained to take the precautions which

a master having such experience would have found essential.

We quote here, as we did for the District Court and for the Court of Appeals, an excerpt from the United States Coast Pilot, Pacific Coast (6th Edition, 1943) a United States Government publication and the standard handbook for all mariners operating off the Pacific Coast, from its section on Pacific Coast weather by months, page 37:

> "October marks the beginning of stormy weather. Occasional disturbances with high southeasterly gales may be expected from the Strait of Juan de Fuca south of Point Reyes. Rainfall is heavier and fog is less frequent except south of Cape Mendocino.
>
> "November is a stormy month. Southeasterly gales are frequent, increasing in severity toward the close of the month. This month marks the beginning of the rainy season in California.
>
> "December is a stormy month. Southeasterly gales are frequent and winds from 40 to 60 miles an hour may occur with these storms. The rainfall is heavy along the entire coast. Low-lying fogs frequently occur in the morning along the coast, but are much less frequent than in summer."

The foregoing is pertinent, not only in showing that the conditions encountered by the tug and tow during the trip were not unforeseeable and were of a type that was within the contemplation of the parties that entered into the towage contract, but also for emphasizing the foolhardiness of Mr. Sommer in

setting out from Drake's Bay with a broken towing engine after he previously and in moderate weather had experienced difficulty in handling the tow and the tow in moderate weather had broken adrift.

The fairlead traveler, the device which makes it possible to heave in on the towing wire, was broken in the difficulties which the tug experienced in the moderate weather on November 7, was removed at Drake's Bay and was never repaired or replaced before or after the tug left Drake's Bay on November 9. This appears from the SEA FOX log (Resp. Exh. A, not printed, R. 372). This, however, was admitted to be the fact and was included in the findings (R. 58). In normal routine the tug in handling her tow would have alternately let out and heaved in on the towing cable in order to ease the strain on the towing winch (R. 167, 192). With the fairlead traveler broken, however, it was impossible for the tug to heave in on the towing cable, and therefore she was unable to slack off on the wire at moments of greatest strain because of fear that she would lose the towing cable completely, approximately 200 feet of towing cable being required on the towing drum to secure it (R. 153, 154). The usual length of towing wire was 1200 feet. As a practical matter, the "spare" towing wire of 600 feet, which was aboard the SEA FOX when she left Drake's Bay, was unusable (R. 155), because of the necessity of keeping 200 feet on the drum and increased probability of breaking the towing cable if a short length is used. It is true that a gale was blowing when the towing wire finally

parted, but it parted because of the breakdown of the towing engine and the inability to heave in or slack out the towing wire, which resulted in the wire's finally smashing itself through against a part of the towing engine (Testimony of libelant Reichel, R. 124)

> "parted right on the fairleads. The wire finally smashed itself right there until it parted."

There is no proof or indication whatsoever that the towing engine or mechanism was inspected, tested or renewed in any way at Drake's Bay following its earlier breakdown. There is no indication or proof of any nature that the inability to heave in the towing wire prior to November 16, and the resultant inability to pay wire out, did not so materially contribute to increased strain on the towing mechanism as to directly cause its final complete breakdown and the ultimate battering apart of the towing cable.

The fact that a gale was blowing when the cable finally broke is and can be no indication that the demonstrated and admitted faults did not or that the lack of a qualified master could not have contributed to the tow's danger.

> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."
>
> *Blumenthal v. Atlantic Coast Line Railway Co.*, 2 C.A. 1943, 139 Fed. (2d) 288.

> "It is not inevitable accident, as was well remarked by the learned judge in the case of the

Juliet Erskine, 6 Notes of Cases, 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.

Union Steamship Co. v. N.Y. & Va. SS Co., 65 U.S. 701, 24 Howard 313, 16 L.ed. 699.

For the reasons stated a writ of certiorari should be issued to the Corut of Appeals for the Ninth Circuit as prayed.

Dated, San Francisco, California,
March 9, 1953.

Respectfully submitted,
CLARENCE G. MORSE,
Proctor for Petitioner.

GRAHAM & MORSE,
FRANCIS L. TETREAULT,
Of Counsel.

(Appendices Follow.)

Appendix "A"

CHRONOLOGICAL STATEMENT OF FACTS.

November 3, 1948:

The SEA FOX and HERALD were surveyed by the Board of Marine Underwriters and were fit to proceed on the tow but with the express proviso that the SEA FOX should take "advantage as much as possible of favorable weather" (R. 285). The tug and tow were originally scheduled to leave San Francisco Bay on

November 4, 1948,

but because of threatening weather conditions, Shipowners concluded to delay the departure (R. 34). At time of departure the SEA FOX had its towing wire, which was about 1200 feet total length, secured to the HERALD and had aboard a spare or "insurance" wire of the same length. In addition, the SEA FOX had a used 600 ft. wire aboard which, even on libelants' testimony, was usable only in an emergency. The SEA FOX did leave on

November 5, 1948.

Satisfactory progress was made until

November 7, 1948,

when the towing line carried away at 1450 hours in relatively moderate weather, the SEA FOX log then indicating a fresh to strong breeze or wind force of force 5 or 6 on the Beaufort scale

or 17 to 27 miles per hour. Eventually the SEA FOX put its spare or "insurance" tow wire to the HERALD but this tow wire became kinked on the winch drum on the SEA FOX. The entire wire was cut off the drum and thrown overboard, and the HERALD drifted until

November 8, 1948,

at 1515 hours, when the Tug SEA PRINCE came from San Francisco and towed the HERALD into Drake's Bay. At Drake's Bay on instructions of SEA FOX, the part of the anchor chain which was hanging in the water (some 45 fathoms) and the SEA FOX's original towing wire were dropped to the bottom of the ocean and abandoned. At Drake's Bay the SEA PRINCE's towing wire was shackled to the HERALD's anchor chain and some 45 fathoms of chain was run out from the HERALD. The broken fairlead traveller on the SEA FOX was not repaired. Thereafter the SEA PRINCE's towing wire was transferred to the SEA FOX, and on

November 9, 1948,

at 0100 hours, SEA FOX and HERALD resumed the voyage. After leaving Drake's Bay the SEA FOX had no insurance wire but only the short length in addition to the wire in use. It was a wire to be used only in an emergency (R. 160). In respect to this short wire, Captain Eastman of the WINONA testified that on the

17th (R. 392): "The SEA FOX stated that they could take the HERALD OF THE MORNING in tow but that they had no towing hawser, as they had broken their hawser."

The weather remained moderate until

November 12, 1948,

and the voyage continued. On this date the weather was generally a "gentle breeze", force 3. On

November 13, 1948,

the SEA FOX overheard weather bureau forecasts of impending storm off the Columbia River and Washington coast. The broadcasts recited (R. 340. See also Appendix "C"):

> "Southeast storm warnings ordered displayed Washington Coast and Mouth of Columbia, small craft warnings south of Astoria to Cape Blanco and over inland waters of Washington 3:00 PM for southeasterly winds 35-45 mph Washington Coast, and 25-35 mph Oregon Coast tonight, shifting to westerly early Sunday and decreasing, and southerly winds 20-30 mph over inland waters."

The SEA FOX knew of the approach of the storm which they thereafter experienced during the following days (R. 194). On this date the weather was a gentle breeze most of the day but blew up to a strong breeze prior to midnight. On

November 14, 1948,

the weather was a "fresh gale", force 8 (37 miles per hour) at 0800 and a "fresh breeze" or a "strong breeze", force 5 and force 6 for most of the balance of the day (17 to 27 miles per hour). At 1900 hours the SEA FOX advised HERALD she had called for aid from the Coast Guard and that her towing engine had broken down. At 2030 hours the Coast Guard cutter BALSAM arrived in the vicinity of the HERALD. At this time HERALD was 17 miles distant and nearly southwest of the Columbia River lightship (R. 409). On

November 15, 1948,

the BALSAM stood by all day and at 2200 hours the tug NEPTUNE arrived in the vicinity and hailed the HERALD and thereafter stood by. During the day of the 15th the wind was "gentle breeze" to "moderate breeze" (force 3 and force 4 most of the time), but built up to a "strong gale", force 9 (44 miles per hour) near midnight. Then on

November 16, 1948,

at 0040, the tow line to the SEA FOX parted. Shortly thereafter the NEPTUNE attempted to shoot a line to the HERALD from the lee side but soon gave up on account of darkness and existing weather. Before daylight on the morning of the 16th the wind was severe, a "whole

gale" (force 10, or 52 miles per hour), thereafter quieting down to a "moderate breeze" (force 4 or 14 miles per hour). During the first eight hours of November 16th the wind was approximately twice as strong as it had been (R. 413). At 0920 when the wind was a "moderate gale", force 7 or 30 miles per hour, the NEPTUNE maneuvered on the weather bow of the HERALD and got a messenger line aboard, but while getting the wire line aboard the HERALD maneuvered too close on the weather bow of the HERALD which was lying in the trough of the sea, and was thrown by a wave against the HERALD's bow, holing NEPTUNE's hull, resulting in her sinking several hours later. At 1515 hours this same date the BALSAM put a 10" Manila line aboard the HERALD, but it soon parted at the splice. On instructions from the BALSAM the SEA FOX remained with the NEPTUNE. The SEA FOX did not return to the HERALD until about 1710 hours (R. 418). The HERALD continued to drift until 1930 hours when the HERALD on orders from the BALSAM, relayed to the HERALD by the SEA FOX (R. 248), dropped her port anchor and thereafter rode at anchor some 10 to 12 miles from shore (R. 264). This distance of 12 miles offshore is confirmed by Captain Eastman of the WINONA, whose log for November 18 recites the HERALD was at anchor at the 35-fathom line and whose

log also gives bearings to two shore points which fixes the position of the HERALD. On

November 17, 1948,

at 0440 the WINONA arrived at the scene (R. 418). The HERALD "was in no immediate danger" (R. 392); during that morning the WINONA placed a 12-inch Manila line aboard and thereafter transferred the line to the SEA FOX. Captain Eastman considered this 12-inch hawser to be adequate to tow the HERALD, stating (R. 401):

> "* * * in my estimation, a Manila hawser that is long gives you a catenary which acts as a cushioning effect when towing in a seaway."

On this date, with minor exceptions, the wind was a "gentle breeze" or force 3 (9 miles per hour). On this day the HERALD let go the balance of its starboard anchor chain which, although buoyed, was never recovered. At 1350 hours the BALSAM left the area to take the NEPTUNE's crew to shore, and the SEA FOX and WINONA stayed with the HERALD. The BALSAM returned at 2312 hours (R. 423). On

November 18, 1948,

the HERCULES arrived at the scene at about 3:00 a.m. (R. 255) and shortly thereafter the WINONA departed, when Captain Eastman of the WINONA "considered that the BALSAM

and the SEA FOX could adequately handle the situation" (R. 397). At 0800 hours the HERCULES put a towing wire aboard the HERALD. During the morning the wind was a "gentle" or "moderate" breeze; at time of departure for Everett it was a "fresh breeze", force 5, and so remained (except at 4:00 p.m. and at 7:00 p.m., when it was force 6, a "strong breeze") until 9:00 p.m., when for two hours it was a "strong gale", force 9, thereafter quickly moderating. The HERALD was unable to release the port anchor chain because the strain prevented the release of the pelican hook, and as a result the tugs were more or less in irons. Accordingly, the port anchor chain of the HERALD was therefore cut, with the aid of the portable cutting equipment supplied by BALSAM and at 1115 hours resumed voyage in tow of HERCULES and SEA FOX toward Everett, Washington, where she arrived without further incident on

November 19, 1948,

On this date the weather was calm (force 0) to a "gentle breeze" (force 3). The tugs and tow were all fast at Everett, Washington, about 9:30 p.m.

Appendix "B"

Beaufort Scale Admiral Beaufort's Numbers	Average of Velocity in nautical miles per hour (knots)	Limits of Velocity in nautical miles per hour (knots)	Seaman's Description of Wind
0	0	Less than 1	Calm
1	2	1 to 3	Light air
2	5	4 to 6	Light breeze
3	9	7 to 10	Gentle breeze
4	14	11 to 16	Moderate breeze
5	19	17 to 21	Fresh breeze
6	24	22 to 27	Strong breeze
7	30	28 to 33	Moderate gale (half a gale)
8	37	34 to 40	Fresh gale
9	44	41 to 47	Strong gale
10	52	48 to 55	Heavy gale (whole gale)
11	60	56 to 65	Storm
12	.....	Above 65	Hurricane

Appendix "C"

0830 PST November 12, 1948.

Tatoosh to Cape Blanco variable winds 5 to 15 mph becoming westerly 10-20 mph late today or tonight. Mostly cloudy with light rain Washington coast by this afternoon and likelihood of light rain north Oregon coast tonight.

0800 PST November 13, 1948, summary northeast Pacific.

A storm of considerable intensity is near 53 N 144 W with pressure about 985 mbs moving northeast towards the coast north of Vancouver Island but will affect the coast as far south as Oregon by tonight. Southerly wind force 6 to 9 within 300 miles of the center on the east side becoming westerly as the storm passes. Another disturbance moving eastward centers north of the Aleutian islands but low pressure and fresh southwesterly winds extend south to latitude 45 from the Aleutians and Alaska Peninsula.

0830 PST November 13, 1948 Tatoosh to Cape Blanco.

Off Washington coast wind becoming south-southeast 25-35 mph this evening increasing during the night and shifting to northwest Sunday. Off Oregon coast wind northwest 15-25 mph passing to south or southeast and increasing to 25-35 mph tonight.

A storm of considerable intensity lies 500 miles off the coast of British Columbia moving toward the coast north of Vancouver Island. It will affect the

coast from Oregon northward tonight but will not extend its effect as far down as California.

2000 PST November 13, 1948.

An intense disturbance has moved east-northeastward at 32 knots or approximately 350 miles southwest of Juneau, Alaska with lowest pressure near 980 mbs. The center is expected to move northeastward at about 20 knots with gale force wind within 500 miles of the center. The associated strong front is located at about 200 miles off the Washington coast and extends to the north-northwestward and to the south-southwestward with gale force wind from about 45 north latitude northward. It is expected to move southeastward at approximately 30 knots.

Coastal storm warnings. Southeast storm warnings are displayed until 1500 PST Sunday on the Washington Coast and mouth of the Columbia River for southeasterly wind 35 to 45 mph. Small craft warnings are displayed for the same period south of Astoria to Cape Blanco and over the inland waters of Washington for southeasterly wind of 25 to 35 mph. Winds will shift to westerly early Sunday.

Appendix "D"

OFFICERS' COMPETENCY CERTIFICATES CONVENTION, 1936.

54 Stat., Part 2, page 1683.

Convention between the United States of America and other members of the International Labor Organization respecting officers' competency certificates. Adopted by the General Conference of the International Labor Organization, twenty-first session, Geneva, October 24, 1936; ratification advised by the Senate of the United States, subject to understanding, June 13, 1938; ratified by the President of the United States, subject to said understandings, September 1, 1938, ratification of the United States of America registered with the Secretary General of the League of Nations October 29, 1938; proclaimed by the President of the United States September 29, 1939.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a draft convention (No. 53) with regard to the establishment by each maritime country of a minimum requirement of professional capacity in the case of captain, navigating and engineer officers in charge of watches on board merchant ships, was adopted on the twenty-fourth day of October

nineteen hundred and thirty-six, by the General Conference of the International Labor Organization at its twenty-first session held at Geneva October 6-24, 1936, a certified copy of which draft convention, communicated by the Secretary-General of the League of Nations, acting in conformity with the requirements in the nineteenth Article of the Constitution of the International Labor Organization, to the Government of the United States of America as a Member of the said Organization, is, in the French and English languages, word for word as follows:

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Twenty-first Session on 6 October 1936, and

Having decided upon the adoption of certain proposals with regard to the establishment by each maritime country of a minimum requirement of professional capacity in the case of captain, navigating and engineer officers in charge of watches on board merchant ships, which is the fourth item on the Agenda of the Session, and

Having determined that these proposals shall take the form of a Draft International Convention, adopts, this twenty-fourth day of October of the year one thousand nine hundred and thirty-six, the following Draft Convention, which may be cited as the Officers' Competency Certificates Convention, 1936:

ARTICLE 1.

1. This Convention applies to all vessels registered in a territory for which this Convention is in force and engaged in maritime navigation with the exception of——

(a) ships of war;

(b) Government vessels, or vessels in the service of a public authority, which are not engaged in trade;

(c) wooden ships of primitive build such as dhows and junks.

2. National laws or regulations may grant exceptions or exemptions in respect of vessels of less than 200 tons gross registered tonnage.

ARTICLE 2.

For the purpose of this Convention the following expressions have the meanings hereby assigned to them:

(a) "master or skipper" means any person having command or charge of a vessel;

(b) "navigating officer in charge of a watch" means any person, other than a pilot, who is for the time being actually in charge of the navigation or manoeuvring of a vessel;

(c) "chief engineer" means any person permanently responsible for the mechanical propulsion of a vessel;

(d) "engineer officer in charge of a watch" means any person who is for the time being actually in charge of the running of a vessel's engines.

ARTICLE 3.

1. No person shall be engaged to perform or shall perform on board any vessel to which this Convention applies the duties of master or skipper, navigating officer in charge of a watch, chief engineer, or engineer officer in charge of a watch, unless he holds a certificate of competency to perform such duties, issued or approved by the public authority of the territory where the vessel is registered.

2. Exceptions to the provisions of this Article may be made only in cases of *force majeure*.

ARTICLE 4.

1. No person shall be granted a certificate of competency unless——

(a) he has reached the minimum age prescribed for the issue of the certificate in question;

(b) his professional experience has been of the minimum duration prescribed for the issue of the certificate in question; and

(c) he has passed the examinations organised and supervised by the competent authority for the purpose of testing whether he possesses the qualifications necessary for performing the duties corresponding to the certificate for which he is a candidate.

2. National laws or regulations shall——

(a) prescribe a minimum age to have been attained by and a minimum period of professional experience to have been completed by candidates for each grade of competency certificate;

(b) provide for the organisation and supervision by the competent authority of one or more examinations for the purpose of testing whether candidates for competency certificates possess the qualifications necessary for performing the duties corresponding to the certificates for which they are candidates.

3. Any Member of the Organisation may, during a period of three years from the date of its ratification, issue competency certificates to persons who have not passed the examinations organised in virtue of paragraph 2 (b) of this Article who——

(a) have in fact had sufficient practical experience of the duties corresponding to the certificate in question; and

(b) have no record of any serious technical error against them.

ARTICLE 5

1. Each Member which ratifies this Convention shall ensure its due enforcement by an efficient system of inspection.

2. National laws or regulations shall provide for the cases in which the authorities of a Member may detain vessels registered in its territory on account of a breach of the provisions of this Convention.

3. Where the authorities of a Member which has ratified this Convention find a breach of its provisions on a vessel registered in the territory of another Member which has also ratified the Convention, the said authorities shall communicate with the consul of the Member in the territory of which the vessel is registered.

ARTICLE 6

1. National laws or regulations shall prescribe penalties or disciplinary measures for cases in which the provisions of this Convention are not respected.

2. In particular, such penalties or disciplinary measures shall be prescribed for cases in which——

(a) a shipowner, shipowner's agent, master or skipper has engaged a person not certificated as required by this Convention;

(b) a master or skipper has allowed any of the duties defined in Article 2 of this Convention to be performed by a person not holding the corresponding or a superior certificate;

(c) a person has obtained by fraud or forged documents an engagement to perform any of the duties defined in the said Article 2 without holding the requisite certificate.

ARTICLE 7

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation, each Member of the Organisa-

tion which ratifies this Convention shall append to its ratification a declaration stating:

(a) the territories in respect of which it undertakes to apply the provisions of the Convention without modification;

(b) the territories in respect of which it undertakes to apply the provisions of the Convention subject to modifications, together with details of the said modifications;

(c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

(d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in sub-paragraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of sub-paragraphs (b), (c) or (d) of paragraph 1 of this Article.

ARTICLE 8

The formal ratifications of this Convention shall be communicated to the Secretary-General of the League of Nations for registration.

ARTICLE 9

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Secretary-General.

2. It shall come into force twelve months after the date on which the ratifications of two members have been registered with the Secretary-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

ARTICLE 10

As soon as the ratifications of two Members of the International Labour Organisation have been registered, the Secretary-General of the League of Nations shall so notify all the Members of the International Labour Organisation. He shall likewise notify them of the registration of ratifications which may be communicated subsequently by other Members of the Organisation.

ARTICLE 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Secretary-General of the League of Nations for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

ARTICLE 12

At the expiration of each period of ten years after the coming into force of this Convention, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall consider the desirability of placing on the Agenda of the Conference the question of its revision in whole or in part.

ARTICLE 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

ARTICLE 14

The French and English texts of this Convention shall both be authentic.

AND WHEREAS it is provided in Article 8 of the said draft convention that the formal ratifications thereof shall be communicated to the Secretary-General of the League of Nations for registration and in Article 9 that the convention shall come into force twelve months after the date on which the ratifications of two Members of the International Labor Organization have been registered with the Secretary-General of the League of Nations, and that thereafter the convention shall come into force for any Member twelve months after the date on which its ratification has been registered;

AND WHEREAS the said draft convention was duly ratified on the part of the United States of America subject to understandings as follows: (Effective in the United States October 29, 1939.)

"That the United States Government understands and construes the words 'vessels registered in a territory' appearing in this convention to include all vessels of the United States as defined under the laws of the United States.

"That the United States Government understands and construes the words 'maritime navigation' ap-

pearing in this convention to mean navigation on the high seas only.

"Nothing in this convention shall be so construed as to prevent the authorities of the United States from making such inspection of any vessel referred to in article V, paragraph 3, within the jurisdiction of the United States, as may be necessary to determine that there has been a compliance with the terms of this convention, or to prevent such authorities from withholding clearance to any such vessel which they find has not complied with the provisions of the convention until such time as any such deficiency shall be corrected.

"That the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision.";

Appendix "E"

ADMINISTRATIVE AND PENALTY PROVISIONS.

46 U.S.C.A., §224a. Same; Officers' Competency Certificates Convention, 1936.

(1) The Officers' Competency Certificates Convention, 1936 (International Labor Organization Draft Convention Numbered 53, "concerning the minimum requirement of professional capacity for masters and officers on board merchant ships"), as ratified by the President on September 1, 1938, with understandings appended, and this section shall apply to all vessels, however propelled, navigating on the high seas, which are registered, enrolled and licensed, or licensed under the laws of the United States, whether permanently, temporarily, or provisionally, including yachts enrolled and licensed, or licensed, with the exception of—

(a) ships of war;

(b) Government vessels, or vessels in the service of a public authority, which are not engaged in trade;

(c) wooden ships of primitive build, such as dhows and junks;

(d) unrigged vessels;

(e) all vessels of less than two hundred gross tons.

(2) All laws in effect on October 29, 1939, covering the issuance, duration, renewal, suspension, and revocation of licenses of masters, mates, chief engineers,

and assistant engineers are hereby made applicable to the issuance, duration, renewal, suspension, or revocation of licenses of masters, mates, chief engineers, and assistant engineers of all vessels to which the Officers' Competency Certificates Convention, 1936, and this section apply, to such extent and upon such conditions as may be required by the regulations of the Commandant of the Coast Guard: *Provided,* That examinations for licenses of masters, mates, chief engineers, and assistant engineers of fishing vessels, not subject to the inspection laws of the United States, shall be oral: *Provided further,* That applicants for licenses as masters, mates, chief engineers, and assistant engineers of fishing vessels not subject to the inspection laws of the United States shall not be required to obtain a certificate from the United States Public Health Service based upon the subject of ship sanitation, and first aid.

(3) Any license issued (whether before, or on, or after, October 29, 1939) to a master, mate, chief engineer, or assistant engineer of a vessel to which this section applies shall be deemed to be a certificate of competency for a master or skipper, navigating officer in charge of a watch, chief engineer, or engineer in charge of a watch, respectively.

(4) No person shall be engaged to perform, or shall perform on board any vessel to which this section applies, the duties of master, mate, chief engineer, or assistant engineer unless he holds a license to perform such duties, issued in accordance with the provisions of subsection 2 of this section: *Provided,* That a license as master, mate, chief engineer, or

assistant engineer of vessels subject to this section may be issued without examination at any time prior to October 29, 1941, to any applicant who has had sufficient practical experience in the position for which he applies to be licensed and has no record of any serious technical error against him: *Provided, further,* That no person to whom a license as master, mate, chief engineer, or assistant engineer is issued without examination may serve under authority of that license as master, mate, chief engineer, or assistant engineer on any vessel subject to the inspection laws of the United States.

(5) It shall be unlawful to engage or employ any person or for any person to serve as a master, mate, or engineer on any such vessel who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense.

(6) If any collector of customs has reason to believe, on complaint or otherwise, that a vessel subject to this section and to the regulations established thereunder is about to proceed to the high seas from a port in the United States or any Territory over which the United States exercises jurisdiction, except the Panama Canal Zone, in violation of any provision of this section or of any provision of the Officers' Competency Certificates Convention, 1936, he may, by written order served on the master or officer in charge of such vessel, detain her until such time as this section shall have been complied with. Clearance shall be refused to any vessel which shall have been ordered detained. If the vessel be ordered detained the master may, within five days, appeal to the Commandant of

the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of the collector.

(7) Foreign vessels to which the Officers' Competency Certificates Convention, 1936, applies shall be subject to such inspection, within the jurisdiction of the United States, except the Panama Canal Zone, as may be necessary to determine that there has been a compliance with the terms of the convention, and in case of any breach of the provisions of the convention by such vessel the collector of customs may, by written order served on the master or officer in charge of such vessel, detain her and refuse clearance to her until such time as the convention shall have been complied with; the collector shall also immediately notify the consul of the country in which the vessel is registered. If the vessel be ordered detained the master may, within five days, appeal to the Commandant of the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of the collector.

(8) No provision of the Officers' Competency Certificates Convention, 1936, or of this section, shall apply to any vessel of the United States of less than two hundred gross tons, nor shall any provision of that convention or this section be deemed to alter, amend, or repeal any statute of the United States in effect on October 29, 1939, with regard to any such vessel.

(9) The Commandant of the Coast Guard shall establish such regulations as may be necessary to secure the enforcement of the provisions of this sec-

tion by any officer of the United States authorized to enforce the navigation or inspection laws of the United States.

(10) The Commandant of the Coast Guard or any officer of the Coast Guard authorized by the Commandant of the Coast Guard may, upon application therefor, remit or mitigate any fine or penalty incurred under this section or any regulation thereunder.

(11) No provision of the Officers' Competency Certificates Convention, 1936, nor of this section, shall apply to any vessel, however propelled, navigating on the Great Lakes.

(12) Where used in this section—

(a) the term "high seas" means all waters outside the line dividing the inland waters from the high seas, as defined in section 151 of Title 33;

(b) the term "unrigged vessel" means any vessel that is not self-propelled.

(13) Nothing contained in the Officers' Competency Certificates Convention, 1936, nor in this section, shall be deemed to extend any provision of section 673 of this title, or to alter, modify, or repeal any statute of the United States in effect on October 29, 1939, except as hereinbefore provided.

(14) This section shall become effective on October 29, 1939.

(15) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

Appendix "F"

(a) Coast Guard Regulations for Issuance of License for Inland Waters Such as Held by Mr. Sommer.

46 C.F.R. 10.05-15 **Master of bays, sounds, and lakes other than the Great Lakes, steam or motor vessels.** (a) The minimum service required to qualify an applicant for license as master of steam or motor vessels on bays, sounds, and lakes other than the Great Lakes is:

(1) 1 year's service as first-class pilot or chief mate of steam or motor vessels on bays, sounds, or lakes other than the Great Lakes; or,

(2) 5 years' combined service in the deck department of sail vessels and vessels propelled by machinery on bays, sounds, or lakes other than the Great Lakes, 1 year of which has been as pilot or chief mate; or,

(3) 1 year's service as master of bays, sounds and lakes other than the Great Lakes steam or motor vessels of 150 gross tons or under while acting under the authority of a first-class pilot's license, or 2 years' experience while acting under the authority of a second-class pilot's license; or,

(4) 5 years' service on bays, sounds, and lakes other than the Great Lakes sail vessels, 1 year of which has been as master; or,

(5) 3 years' service as master of bays, sounds, and lakes other than the Great Lakes sail vessels for license as master of steam or motor vessels; or,

(6) 2 years' service in the deck department of bays, sounds, and lakes other than the Great Lakes steam or motor vessels, 1 year of which shall have been either as wheelsman or in assisting in the navigation of such vessels, while holding a first-class pilot's license for bays, sounds, and lakes other than the Great Lakes, for license as master of steam or motor vessels of 500 gross tons and under navigating all bays, sounds, and lakes other than the Great Lakes.

10.05-49 **Examination for license as master of bays, sounds, and lakes other than the Great Lakes steam and motor vessels.** (a) An applicant for license as master of bays, sounds, and lakes other than the Great Lakes steam or motor vessels shall be required to pass a satisfactory examination as to his knowledge of the subjects listed in this paragraph:

(1) Inland Rules of the Road or Pilot Rules applicable to the waters desired.

(2) Distance off by bearings and run.

(3) Speed by revolutions and by observation of landmarks.

(4) Chart navigation and piloting.

(5) Aids to navigation.

(6) Winds, weather, and current.

(7) Signals; storm, wreck, distress, and special.

(8) Stability and ship construction.

(9) Cargo stowage and handling.

(10) Seamanship.

(11) Temporary repairs to hull and equipment.

(12) Drills and lifesaving apparatus.

(13) Ship sanitation; Rules and Regulations for Vessel Inspection, and Navigation Laws of the U. S.

(14) Ship's business.

(15) General.

(16) Practical chart work.

(17) Such further examination of a non-mathematical character as the Officer in Charge, Marine Inspection, may consider necessary to establish the applicant's proficiency.

10.05-59 **Examination for license as mate of inland or river steam or motor vessels.** An applicant for license as mate of inland or river steam or motor vessels shall be required to pass a satisfactory examination as to his knowledge, experience, and skill in stowage and cargo handling, the operation and handling of fire apparatus, the launching and handling of lifeboats, his knowledge of life preservers and the method of adjusting them, his ability to manage the crew and direct and advise the passengers in case of emergency, his general familiarity with his duties in maintaining discipline and protecting the passengers, and such further examination of a non-mathematical character as the Officer in Charge, Marine Inspection, may consider necessary to establish the applicant's proficiency.

(b) Coast Guard Regulations for Issuance of High Seas License Which Mr. Sommer Should Have Held.

Subpart 10.15—Licensing of Officers for Uninspected Vessels

10.15-1 **Applicability of laws.** All the provisions of R. S. 4131, 4250, 4403, 4405, 4438, 4439, 4440, 4441, 4445, 4446, 4447, 4448, 4449, 4450, as amended, sec. 2, 23 Stat. 118, sec. 2, 29 Stat. 188, sec. 1, 34 Stat. 1411, sec. 3, 40 Stat. 549, and sec. 5, 49 Stat. 1935; 46 U. S. C. 221, 224, 225, 226, 227, 228, 229, 231, 232, 233, 234, 235, 237, 239, 250, 372, 375, 672a; referring to the issuance, duration, renewal, suspension or revocation of licenses of masters, mates, chief engineers and assistant engineers, and the provisions of the following regulations in this subpart shall be applicable to all uninspected vessels to which the Officers' Competency Certificates Convention, 1936, and the Act approved July 17, 1939 (R.S. 4438a; 53 Stat. 1049; 46 U. S. C. 224a) making effective the provisions of the Convention apply.

10.15-29 **Professional requirements for original and raise of grade of licenses.** (a) For license as master or chief engineer, a candidate must have served 4 years at sea, on deck or in the engine room, respectively, of which 1 year must have been as licensed mate or assistant engineer, respectively, except as otherwise provided in the regulations in this Subpart.

(b) For license as mate or assistant engineer, a candidate must have served 3 years at sea, on deck or in the engine room, respectively.

10.15-31 **Examination requirements for licenses**—(a) *General.* The examinations given by the Coast Guard will be practical, not theoretical. They will be written, where possible, and if an oral examination is necessary, it shall be taken down in writing. The examination for licenses limited to fishing vessels shall be oral only.

(b) *Master.* Candidates for license as master will, in addition to the subjects given in the examination for mate, be required to understand and give satisfactory explanations of:

(1) Navigation, including:

(i) Latitude by altitude of Polaris.

(ii) Elementary questions on compass deviation.

(2) Rudimentary seamanship, including:

(i) Meteorology, use and reading of weather bulletins.

(ii) Getting under way.

(iii) Tending vessel at anchor; mooring and unmooring.

(iv) Keeping a ship's head to sea in heavy weather with engines broken down.

(v) How to rig a jury rudder.

(vi) Action to be taken in the event of springing a leak.

(vii) Cast of lead in heavy weather.

(c) *Mate.* Candidates for license as mate will be required to understand and give satisfactory explanations of:

(1) Navigation, including:

(i) Variation, deviation of the compass, and simple methods of determining the deviation by the means of ranges, and by bearings of the sun.

(ii) Use of a chart and the meaning of the various signs and abbreviations thereon; method of determining and laying off compass courses and distances on a chart, and allowing for set and drift; fixing the ship's position by cross bearings of two objects; or by two bearings of the same object.

(iii) The traverse tables and a day's work in its simplest form.

(iv) Determining of latitude by meridian altitude of the sun.

(v) Longitude by position line or by time sight of the sun.

(vi) The use and adjustments of the sextant.

(vii) The use and reading of the aneroid barometer.

(2) Rudimentary seamanship, including:

(i) The use and construction of a sea anchor.

(ii) The marking and use of the lead line.

(iii) Man reported overboard.

(iv) Handling of a vessel's boat in heavy weather.

(v) Elementary first aid.

(3) The Rules to Prevent Collisions of Vessels including both the International Rules and the Pilot Rules for Inland Waters. Particular attention will be given to the steering and sailing rules, although inability to repeat them verbatim will not entail failure, *Provided,* That the candidate understands their full significance, content, and practical application. Models will be used to test the candidate's judgment and ability to act correctly and promptly.

(4) Distress signals and use of line throwing apparatus.

(5) Buoyage system and aids to navigation.

(6) Precautions to be taken against fire, explosions from oil or gas, and spontaneous combustion. Methods of dealing with fire and use of fire extinguishers, handling of vessels after fire is discovered.

(7) Candidates for a sailing ship license will also be asked questions on the taking in and setting of fore and aft sail, and applicable questions relating to the handling of a sail vessel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 652

WATERMAN STEAMSHIP CORPORATION, a corporation,

Petitioner,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,

Respondents.

BRIEF FOR RESPONDENT SHIPOWNERS AND MERCHANTS TOWBOAT CO., LTD., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENT SHIPOWNERS AND MERCHANTS TOWBOAT CO., LTD., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner engaged respondent's tug *Sea Fox* to tow petitioner's dead ship, *Herald of the Morning,* from San

Francisco, California, to Everett, Washington. When the tug and tow were off the coast of Oregon, a very heavy storm was encountered, with tremendous seas and gale winds. The tow line parted after many hours of excessive strain, and the *Herald* was left adrift, without power, in danger of going ashore and being totally lost.

Thereafter, respondent's tug, in company with other vessels, rendered services which were obviously salvage, and, by strenuous and skilful efforts, managed to secure control of the *Herald* and tow her safely into port. Salvage libels were filed by respondent as owner of the tug *Sea Fox,* and by another corporation owning two other vessels which had participated in the rescue. These were consolidated for trial, which lasted for several days. Personnel from all three tugs and from the *Herald* testified in person in court, and depositions were introduced by petitioners from the commanding officers of two Coast Guard vessels which had also assisted to some extent in the rescue.

Although petitioner (respondent below) raised a number of issues in the District Court, its basic defenses were two in number: (1) that the *Sea Fox* could not claim salvage in any event, because it had contracted to tow the *Herald* from San Francisco to Everett; (2) that the *Sea Fox* could not claim salvage because its negligence brought about the peril of the *Herald* which gave rise to her need for salvage services. The latter, of course, involved purely factual issues as to the conduct of the *Sea Fox* and the circumstances of the voyage.

At the end of the trial both sides filed written briefs, and the District Judge then rendered an able and exhaustive opinion in which he discussed the law and the issues, stated the facts which he considered proved by the evidence, and ordered judgment for the salvors against petitioner. (R. 38-54. Reported in 98 F. Supp. 123.)

Findings were proposed by this respondent as the successful party, and petitioner made objections and counter-proposals. After a hearing in open court on the form of findings (R. 466-77), several changes were ordered made in the findings first proposed by this respondent, and those amended findings were then adopted and signed by the trial judge.

Petitioner then appealed and argued that the findings below were erroneous and unsupported by the evidence. The Court of Appeals for the Ninth Circuit affirmed the decree, stating properly that "the question is essentially one of fact," and ruling that "These findings support the award, and we are of opinion that they are not clearly erroneous, *or erroneous at all,* for that matter." (199 F. (2d) 600 at p. 601.)

Petitioner's application for certiorari attacks the finding that the *Herald's* peril was not caused by the tug's faults, and thus seeks a review in this Honorable Court of the evidence on which the District Court and the Court of Appeals found and held in favor of respondent. No issue of law is presented, and a third trial on the facts is really all that petitioner is asking.

Under these circumstances, the well settled rule of this Court as to the concurrent findings of the courts below applies, viz., that this Court will not undertake to review factual findings made and approved by two courts.

In the admiralty case of *Just v. Chambers,* 312 U.S. 383 at 385, 85 L. Ed. 903 at 905, this Court said:

> "In support of the judgment of the Circuit Court of Appeals, respondents asks us to review the evidence with respect to the cause of the claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the Courts below upon these matters (Texas & N. O. R. Co. v. Brotherhood of R. & S. Clerks, 281 U.S. 548, 558, 74 L. Ed. 1034, 1039, 50 S. Ct. 427) and we confine our attention to the question of the survival of the causes of action."

The same rule is enunciated in *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U.S. 275 at 278, 88 L. Ed. 721 at 724, and in *Anderson v. Abbott,* 321 U.S. 349 at 356, 88 L. Ed. 793 at 799, and was more recently stated as follows:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,* 336 U.S. 271 at 275, 93 L. Ed. 672 at 677.

That petitioner is merely seeking one more review of the evidence, in defiance of the rule just cited, will be demonstrated in the remaining portions of this brief.

THE ISSUES.

It is difficult to segregate and list the issues which petitioner is attempting to raise, since they are stated in so many different ways in so many different places in the petition and brief in support thereof.

Under a "Questions presented" heading in the petition (pp. 6-10), petitioner lists *five* "questions," with several subdivisions for each of the first three. Under the heading, "Reasons relied upon for issuance of writ," the petition (pp. 10-14) lists *nine* "reasons." The brief in support of the petition (pp. 21-22) specifies *four* "errors" which the Court of Appeals is alleged to have made.

These various lists of "errors," "questions" and "reasons" are redundant and overlapping almost to the point of confusion. We propose to answer very briefly the "reasons for issuance of writ" set forth at pages 10 to 14 of the petition, and then to comment on the four "specifications of error" which are discussed in petitioner's supporting brief.

I.

NO VALID REASON FOR ISSUANCE OF WRIT OF CERTIORARI HAS BEEN PRESENTED.

Petitioner's first five "reasons" all relate to the so-called *Pennsylvania* rule as applied to the admitted fact that the license held by the master of the tug did not cover the particular waters in which the voyage in question was made. (The master had been operating this tug for six years (R. 231) and had previously towed eight

other vessels up the west coast, including two ships of the size of the *Herald* to Washington ports. He held a license for inland waters, however, rather than for the high seas.) The so-called *Pennsylvania* rule, first enunciated in *The Pennsylvania,* 86 U.S. 125, 22 L. Ed. 148, is that a ship in collision which has violated a statute governing navigation has the burden of showing that her statutory violation could not have been a cause of the collision, in order to escape being held at fault.

Petitioner's first five "reasons" are not supported by the record, and are self-contradictory on their face. Thus the first reason advanced is that the Court of Appeals decided an important question of law which has *not* been, but should be, decided by this Court. The second reason is said to be that the decision of the Court of Appeals conflicts with decisions which the Supreme Court *has* made.

We concede that, in a collision situation, a vessel guilty of statutory fault (i.e., of violation of a statute laying down the "Rules of the Road") must prove that her violation of the statute *could* not have been a cause of the collision. (The *Pennsylvania* rule.) Whether the same rule applies to *non*-collision situations is open to grave doubt, to say the least, since collision cases are *sui generis* in a sense, with rules which need not necessarily apply to other situations. This was recognized in *Halcyon Lines v. Haenn Ship C. & R. Co.,* 342 U.S. 282, 96 L. Ed. 318, 72 S. Ct. 277, where the collision doctrine of equal division of damages and contribution between the owners of ships mutually at fault was held applicable only to collision

cases, and not to maritime cases involving non-collision situations.

Just as the cited case refused to upset the common law rules on contribution between joint tort feasors by extending the collision rule on that subject, it is arguable that the usual rule on proving proximate cause is not to be upset by extension of the radically different collision rule.

The answer to petitioner's first three reasons, however, is that the decision of the Court of Appeals *does not decide at all on the legal issue as to the applicability of the "Pennsylvania rule."* The issue did not *need* to be, and *was not, decided.*

The opinion of the trial judge indicates his *doubt* that the *Pennsylvania* rule as to the burden of proof on causation applies to a salvage situation and a lack of the proper license, but goes on to say:

> "Assuming, however, that in this case the rule is applicable, *the burden of proof has been carried,* because the evidence *clearly* shows that the *Herald* was set adrift and carried into a position of danger *solely by violence of the storm."* 98 F. Supp. 123 at 129-30. (R. 51.)

The Court of Appeals found that the findings "are not clearly erroneous, or erroneous at all, for that matter." With reference to the *Pennsylvania* rule, it stated, in effect, that the applicability of that doctrine to the case at bar need not be decided, since the findings exonerated libelant (respondent here) even if the rule were applicable.

The language of the appellate decision makes this quite clear:

> "It is argued that the so-called rule of *The Pennsylvania,* 19 Wall. 125, 86 U.S. 125, 22 L. Ed. 148, is applicable here, namely that where a ship has committed a positive breach of a statute she must show not only that probably her fault did not contribute to the disaster, but that it did not and could not have done so. The trial court, assuming the applicability of the rule, held that the burden of proof had been met since it was clearly shown by the evidence that the *Herald* was set adrift and carried into a position of danger solely by the violence of the storm. It found also that, in addition to Captain Sommer, the *Sea Fox* was officered by two others, one of whom had an unlimited master's ocean going license and the other an unlimited mate's ocean license; and that in fact all three were experienced and competent men." (199 Fed. (2d) at p. 601.)

That holding does *not* pass on the applicability of the *Pennsylvania* rule at all, but leaves the legal issue open to determination in a proper case. It does *not* conflict with *any* decision in *any* court, then, and the assumed "conflict of decisions" relied on by petitioner for certiorari simply does not exist.

"Reason number 4" is stated to be that the decision below conflicts with other cases from other circuits, in which it has been held that violation of statutory manning requirements is a statutory fault. There is no such "conflict" here. The Court of Appeals did not hold that Capt. Sommer's failure to have an off-shore license was not a statutory fault. It recognized and accepted the fault, but

approved the finding that such fault was not and *could* not have been a cause of the *Herald's* difficulties.

"Reason number 5" is a gross misstatement and an unwarranted reflection on the Court of Appeals. Petitioner says that the Court of Appeals "failed to apply the *Pennsylvania* rule and, without review, consideration or question, accepted the trial court's statement that if the *Pennsylvania* rule be deemed to apply, the burden of proof thereunder had been met by respondent." (Petition, p. 12.) We have already shown that the Court of Appeals did *not* fail to apply the *Pennsylvania* rule, but held that *it had been met and satisfied on the facts.*

There is no justification for the charge that the appellate court accepted the trial court's statement "without review, consideration or question." The case was vigorously briefed and argued, and the opinion of the Court of Appeals states that the findings of the District Court were not clearly erroneous "or erroneous at all."

Reasons 6 and 7 relate to the findings and the so-called "appeal proofing" which so engrosses and obsesses petitioner. Once again, petitioner assumes and charges that the Court of Appeals failed to review the findings, and merely accepted them without comment. Nothing in the record supports the charge that the Court of Appeals failed in its duty to review the record and/or to consider the arguments made before it by petitioner.

Reasons 8 and 9 say that the Court of Appeals was wrong in giving full weight to findings prepared by counsel and in holding that they were subject to review only if there was clear error. We will discuss this aspect when

we reply to petitioner's first two "specifications of error" in its supporting brief. Suffice it here to say that the opinion of the Court of Appeals does *not* state or hold that it was giving any undue weight to the findings.

II.

THE COURT OF APPEALS DID NOT ERR IN APPROVING THE DISTRICT COURT'S FINDINGS OF FACT.

Petitioner's brief in support of its petition (pp. 23-41) argues several points, which resolve into three contentions:

(1) That the findings of the District Court were improperly prepared and are entitled to no weight.

(2) That many of the findings are really conclusions of law.

(3) That the findings are contrary to the evidence, in finding that no fault of the tug could have contributed to the peril which necessitated the salvage services.

We reply to those contentions as follows:

(1) The findings were properly made and are entitled to affirmance.

Petitioner cites cases which say that findings prepared by winning counsel and accepted by the trial court without modification are not entitled to the same weight as findings drafted by the court itself. We shall point out, in a moment, that no such situation is here presented. Before doing so, however, let us note that the cited cases do *not* hold that such findings are automatically wrong, or must

be reversed. In each of the cited cases the appellate court found that the evidence did not support the findings, and reversed on that ground. The basic question there, as always, was whether the evidence supported the findings. As this Court has said,

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See *U. S. v. Forness* (CCA 2nd) 125 F. (2nd) 928, 942, 943. *But they are none the less the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.*"
>
> *U. S. v. Crescent Amusement Co.*, 323 U.S. 173 at 184-5, 89 L. Ed. 160 at 169.

The instant case is *not* one where the lower court simply announced a decision and then blindly signed findings prepared by prevailing counsel. The record shows that the issues were carefully considered and decided by the District Judge, who wrote an able and exhaustive opinion. The findings followed the substance and intent of that opinion, and were settled only after losing counsel had been heard in court on the form of the findings. Thus petitioner's complaint is really just the usual one of any losing party that the trial court decided against him.

The opinion of the trial court (R. 38-54; reported in 98 F. Supp. 123) discusses the facts and the issues quite fully and fairly, and passes on each issue raised by petitioner as the respondent below. The statement in the opinion that, if the *Pennsylvania* rule applies, libelant

carried the burden of proof, is not a "dictum" as petitioner suggests, but is a finding made by the trial court *on its own initiative* after considering the evidence and the trial briefs. The formal findings merely follow that opinion, in substance.

The reporter's transcript on settlement of findings (R. vol. II, pp. 466-477) shows that petitioner's views as to the form they should take were fully presented to the lower court, and that changes were ordered to be made in the form first lodged by libelant below. In other words, the trial judge did not blindly accept libelant's proposals, but considered the issues carefully, and deliberately selected the form to be used, *in accordance with the previous opinion.*

In fact, that transcript of the settlement of findings shows that petitioner was mainly trying to get some conclusions of law added to the findings, in the hope that a reversible error would result, and that *petitioner had and made no objection to the basic method used in drafting the findings.* Petitioner's counsel expressly so stated in open court when the findings were being settled:

> "*Mr. Tetreault.* If I may continue. There are a number of items of fact as to which there are no specific findings either in the opinion or in Mr. McKeon's proposal. Mr. McKeon's proposal, so far as findings of fact are concerned, was primarily a recapitulation of the articles in his libel, which is *proper,* and *to which I have no objection.*" (R. Vol. II, p. 472.)

The entire history of this case demonstrates that both courts below were fully cognizant of the issues, and

reached a decision thereon of their own volition after hearing from both parties.

(a) After considering the evidence and the trial briefs, the District Judge rendered an opinion in which he outlined the facts and issues and announced his finding and decision in his own language.

(b) Prevailing counsel then proposed formal findings which followed the substance and intent of that opinion.

(c) Losing counsel then made objections and suggestions as to the form of the findings, and was given an opportunity to express his views in open court.

(d) At that hearing the court ordered some changes in the form of findings first proposed by libelant, after petitioner's counsel had presented his criticisms and counter-proposals, and *after he had stated that he had no objection to the general method used by the prevailing party in drafting its proposed form of findings.*

(e) The Court of Appeals did not give these findings any undue or improper weight, or abdicate its function as a reviewing court. It considered the record and the arguments of counsel, and decided that the findings were "not clearly erroneous, or erroneous *at all,* for that matter."

(2) The findings of fact are just that, and involve no conclusions of law.

Petitioner's second objection to the findings is that they are really conclusions of law. Petitioner is confusing

a finding of ultimate fact with a conclusion of law. The question of whether or not the acts and omissions of the tug were or could have been a cause of the tow line breaking and putting the *Herald* in danger is solely and exclusively a question of fact.

Basically, petitioner contended that certain acts and omissions of the tug were negligent, and that these negligent acts and omissions caused the danger from which the *Herald* then had to be rescued. We know of no statute, text, decision or rule of law which could possibly help a court to decide whether the alleged absence of a full-length spare towing cable or the alleged disregard of storm warnings caused or could have caused the *Herald's* troubles. Such issues are purely and simply issues of fact, depending on all the facts and circumstances.

With respect to the tug master's lack of a license for these particular waters, the question of the severity of burden of proof is a legal question. If the *Pennsylvania* rule be applied to put the burden on this respondent to show that the absence of the required license could not have contributed to the peril of the *Herald,* the question of whether respondent bore that burden successfully is a question of fact, depending on what happened and what was done at the times concerned.

Neither court below decided for libelant (respondent here) on the basis that the *Pennsylvania* rule did not apply to libelant. On the contrary, the District Court found that libelant had borne the *Pennsylvania* burden successfully (i.e., had proved that the "statutory fault"

could not have been a cause), and the Court of Appeals approved and affirmed this finding.

On the issue of causation, the courts had to consider what *happened* on this voyage, and whether anything *done* or *omitted* by the tug and her personnel was or could have been a cause of the *Herald's* getting into danger. Those were purely factual matters, on which both lower courts found against petitioner.

(3) The courts below correctly found that no fault of the tug could have contributed to the peril which necessitated the salvage services.

Petitioner attempts to reargue its charges below that the tug was guilty of causative fault in such respects as disregarding storm warnings, proceeding with a broken fair lead traveler, and failing to have a full length "insurance wire" aboard. Both courts below found that none of these things had anything to do with the *Herald's* difficulties. These are factual issues on which petitioner is asking for a third review in this Court. We understand that such is not a proper basis for *certiorari*, and will therefore make only brief comments on those issues.

(a) "*Disregard of storm warnings.*" Petitioner evasively tries to give the impression that the tug left a safe harbor in the teeth of storm warnings, or failed to put into a port of refuge when warnings were received by radio at sea. There is not one fact in the record to support this charge.

The voyage began in fine weather from San Francisco (R. 108). Enroute, a tow line broke, and a brand new one was then installed at Drake's Bay. The voyage was

then resumed in fine weather (R. 110), and so proceeded for several days. When storm warnings were broadcast, the tug and tow were off the Oregon coast, and the only geographically available refuge was the Columbia River (R. 151). The entrance to the river is over a bar which is a recognized hazard in rough weather, particularly for a tug with a dead tow.

As the District Court opinion points out, "four experienced tug masters testified that the weather conditions from November 13th through the 16th were such that it would not have been feasible for the tug to try to take the *Herald* across the Columbia River bar. Under all the circumstances, it was but good seamanship for the *Sea Fox* to head out to sea to try to ride out the storm." (R. 48-49; 98 F. Supp. 123 at 129.)

After receiving storm warnings, the *Sea Fox* radioed for help to stand by, and a Coast Guard vessel was on hand and standing by over 24 hours before the tow line broke. (R. 409, 412.) The tug thus did all it could, and did not "disregard" storm warnings.

Petitioner refers to the "strikingly similar factual situation" in *Blumenthal v. Atlantic C. L. Ry.* (2d Cir.), 139 F. (2d) 288, in which it was held that act of God is no defense if negligence existed which allowed or caused the act of God to bring about the damage. The facts in that case are so strikingly *dis*-similar to this case that the citation can hardly have been seriously intended.

In the *Blumenthal* case a tug took its tow out of a sheltered harbor in the teeth of warnings that a hurricane was at hand. In the case at bar, as we have seen, the

voyage began in calm weather and continued for several days before any storm warning was broadcast. When the warning was received, the flotilla was out at sea, there was no available port of refuge, and there was nothing to do but head away from a lee shore and try to ride out the storm.

(b) *Absence of an "insurance wire" on the tug.* The tug resumed the voyage from Drake's Bay towing the *Herald* on a brand new 1200-foot towing cable or "wire," with a 600-foot spare wire on the tug. No one testified that this spare was inadequate or improper, or that the tug violated approved practice. More importantly, however, the evidence showed conclusively and dramatically that the presence of a dozen 1200-foot spare wires on the tug would have been of no help.

The *Herald's* danger arose when and *because* the tow line from her bow to the tug parted in a full gale. The presence or absence of spare wires on the tug had nothing to do with causing this break. Thereafter, several vessels on the scene tried to get another line onto the *Herald,* but with no immediate success. In fact, the tug *Neptune* was sunk by collision with the *Herald* while maneuvering near her in an effort to pass a line. (R. 199-206.) When the weather permitted, the Coast Guard then got a line aboard the *Herald* and gave the other end to the *Sea Fox,* which thus regained control of her tow as soon as the weather allowed. What the absence of a 1200-foot spare wire on the tug had to do with the *Herald's* difficulties is difficult to see, and the District Court properly ruled that:

> "Nor does the record disclose in what way having an extra full-length tow wire on board would have enabled the *Sea Fox* to do anything she did not do, since the storm that caused the tow wire to part also made it impossible to get any line aboard the *Herald.*" (R. 49; 98 F. Supp. 123 at 129.)

(c) *The broken fair lead traveler had nothing to do with the case.* After leaving San Francisco, the tug's fair lead traveler broke, and she resumed the voyage from Drake's Bay without being able to repair it. This "traveler" is a device for spreading the tow cable evenly back and forth on the drum of the tug's towing winch when the cable is being wound onto the drum (so that it will not bunch, but will go on evenly and smoothly, like a spool of thread).

During the voyage, however, the tow line had to remain out, pulling on the *Herald,* and there was no occasion to reel in, hence no need for the fair lead traveler. Furthermore, over twenty-four hours before the tow line broke, the tremendous strain on the tug's towing engine stripped the teeth on the drum, which could no longer be held still. To prevent it turning and the end of the wire being lost, it was necessary to wedge a large piece of metal between the stationary frame of the winch and the drum itself. (R. 112-113; 169-70.) From then on, of course, it was *impossible* to take in or let out line, and the fair lead traveler would have been of no possible use whatever, even if in perfect operating order.

III.

THE COURTS BELOW CORRECTLY FOUND AND HELD THAT THE MASTER'S LACK OF THE CORRECT LICENSE COULD NOT HAVE BEEN A CAUSE OF THE HERALD'S NEED FOR SALVAGE SERVICES.

We have conceded that tug captain Sommers' license was for inland waters rather than the high seas. No one, including the courts below, has said that this was not a technical violation of a statutory requirement. The issue is whether or not this lack of an offshore license had anything to do with the *Herald's* going adrift into danger when the tow line broke after being severely strained for many hours in a full gale at sea.

On that issue petitioner argues that the *Pennsylvania* rule required the salvor to show that this technical statutory violation could not have been a contributing cause of the *Herald's* difficulties, and that the salvor failed to carry that burden of proof. Petitioner's brief in support of its application contends that the Court of Appeals ruled that the *Pennsylvania* rule did not apply, and petitioner talks of this "novel and vicious precedent."

As we have already pointed out, the Court of Appeals made no such ruling, "vicious" or otherwise. It approved and confirmed the finding that, assuming the rule to apply, the burden had been met. The decision does *not* repudiate the *Pennsylvania* rule, or hold it inapplicable to a salvage case, nor does it expressly hold the rule applicable. There was no need to pass on the legal issue because, as a matter of fact, the "violation" could not have been a causative factor, hence the salvor was

entitled to an award, even assuming the rule applied. Such a decision was entirely proper to make, and constitutes a factual finding which rendered the legal issue moot. On such a finding, any dogmatic statement as to the applicability of the *Pennsylvania* rule would have been pure dictum, at most.

Petitioner's criticism of the decision by the Court of Appeals as laying down bad law, then, is wide of the mark. No such decision had to be made. No such decision *was* made. The case was decided on the *facts,* and has nothing to do with the question whether the *Pennsylvania* rule applies to such a non-collision situation as a salvage case.

Petitioner's next criticism is that, on the record, it was error to find that the captain's lack of the appropriate license could not have been a cause of the troubles of the *Herald.* This is a factual issue on which both the District Court and the Court of Appeals concurred in finding in respondent's favor. A brief summary of the record is all that need be presented here to show that the finding was proper.

The tug's job was to tow a dead ship up the coast. It called for an experienced *tug* master, not just a master. There are probably several thousand men who hold the proper license to act as captain of a ship on the high seas, but who would have been incompetent to take on this *towing* job, because they had no training or experience with tugs and tows. Capt. Sommers had six years' experience on this tug, and had taken eight other tows up the coast successfully.

A piece of paper has no magic power to confer knowledge or experience, or to govern the behavior of inanimate objects. It cannot still the winds and calm the waves. What was needed was not a particular kind of *document*, but a particular kind of *man*—a competent and experienced tug master. And, in judging his conduct, the presence or absence of a license has no weight or bearing. The question was solely what he did and what he should have done. It is not the law that acts which would be proper on the part of a licensed officer somehow become improper if done by an unlicensed man.

On the *facts* as to how the tug was operated, the situation was this:

1. First Mate Reichel of the tug had an unlimited master's license for any ocean (R. 104), and the second officer had an unlimited first mate's license for any ocean. (R. 360.)

2. Capt. Sommers had ocean going experience on this tug, and six years' towing experience. He did hold a master's license for inland waters.

3. The trial court's opinion, based on their testimony in open court, expressly states that these three tug officers were experienced and competent men. (R. 50.)

4. Nothing done or omitted by the tug could have had anything to do with the *Herald's* troubles.

5. The *Herald's* danger arose when and because the tow line parted in a full gale, leaving her adrift without power.

6. Salvage services were promptly and efficiently rendered thereafter as soon as the weather permitted.

Those are the *facts*, and on those facts the District Court found that the tug had successfully met the *Pennsylvania* burden of proof. The Court of Appeals affirmed that finding. On that state of the record, petitioner is simply attempting to retry the facts for a third time, and has stated no reason why *certiorari* should be granted.

CONCLUSION.

That a writ of *certiorari* should not issue herein is

Respectfully submitted,

Dated, San Francisco, California,
April 6, 1953.

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